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# Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech

Gregory P. Magarian

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## Article

# Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech

Gregory P. Magarian<sup>†</sup>

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As the war in Iraq and the campaign against international terrorism drag on, the federal and state governments as well as nongovernment institutions have grown increasingly bold in their efforts to suppress political debate and dissent in the United States. Law enforcement officers infiltrate and bully peaceful dissident groups; police crack down brutally on mass demonstrations; cities confine protestors at major political events to ironically designated “free speech zones.” These abuses buttress a contention, familiar from the work of several prominent First Amendment theorists, that the Supreme Court can provide political debate and dissent sufficient constitutional protection only by aiming First Amendment jurisprudence exclusively at protecting political speech—expression whose primary value lies in its contribution to political discourse. On this view, broad, undifferentiated First Amendment protection for speech compels balancing of expressive interests against competing regulatory interests, and that balancing too easily allows the government to justify suppression of political debate. In contrast, narrowing the First Amendment’s scope to encompass only political speech would allow the Court to deepen constitutional protection for the category of expression that sustains our democratic system.

The democracy-focused approach to expressive freedom, however, has long struggled against the more influential idea that the Free Speech Clause exists to guarantee individual autonomy. On this view, all speech deserves the same degree of constitutional protection because all speech entails the same exercise of autonomous will. Accordingly, present First Amendment doctrine favors breadth over depth of constitutional protection, giving all behavior that fits the descriptive category “speech” the same presumption of protection against

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government regulation but balancing all expressive interests against countervailing regulatory interests. The Court's substantial embrace of autonomy as the basis for First Amendment doctrine reflects the widespread appeal of autonomy-based conceptions of individual rights. Treating autonomy as the dominant value behind expressive freedom also provides a straightforward basis for protecting nonpolitical speech. Deepening protection for political speech by narrowing the First Amendment's scope would compromise protection of nonpolitical expression, including much art, sexually explicit speech, and commercial advertising. However, despite the strengths of the autonomy-focused approach to expressive freedom, its problem is that it dilutes the First Amendment's protection of political speech by allowing even trivial government interests to trump the interest in advancing political debate. In addition, by treating expressive freedom as a negative right, present First Amendment doctrine inadequately explains why autonomy matters in speech controversies and when autonomy values should yield to government regulatory interests.

An ideal regime of expressive freedom would protect political debate with the depth of the democracy-focused First Amendment paradigm while simultaneously casting a broad enough net to safeguard speech that substantively advances autonomy. The Supreme Court recently opened a path toward such an ideal regime—a path that would expand constitutional speech protection beyond the First Amendment into a distinct source of constitutional rights. In 2003, the Court held in the landmark case of *Lawrence v. Texas* that state bans on “sodomy” violate the Fourteenth Amendment's substantive due process guarantee.<sup>1</sup> *Lawrence* has potential importance for speech protection because of the decision's two boldest elements: its emphatic identification of substantive due process with the normative value of personal autonomy and its prohibition of state regulations that rest purely on moral disapproval of behavior. By establishing that the Due Process Clause safeguards behavior integral to personal autonomy, the Court created an alternative repository for the idea that nonpolitical speech essential to personal autonomy deserves constitutional protection. By interposing the Due Process Clause against moral regulations, the Court replicated in the substantive due process setting the First Amendment's antipathy toward offi-

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1. 539 U.S. 558, 578–79 (2003).

cial attacks on socially undesirable ideas. Substantive due process doctrine after *Lawrence* allows for appropriate balancing of expressive autonomy interests against government interests in preventing tangible harms.

This Article proposes that the Court fulfill the speech-protective potential of *Lawrence* by transplanting the Constitution's protection for nonpolitical speech—speech that primarily serves the interest in personal autonomy as distinct from the interest in democratic debate—from the First Amendment to the Due Process Clause. Invoking substantive due process to protect nonpolitical speech would create an unprecedented opportunity to deepen the First Amendment's protection of political speech while improving present First Amendment doctrine's protection of speech that primarily serves personal autonomy. The First Amendment's Free Speech Clause would assume a coherent focus based on the importance of political debate for a healthy democratic system. At the same time, the Constitution would protect nonpolitical expression based not on the arid premise that such expression is formally "speech" but on the crucial understanding that nonpolitical expression, to the extent it advances personal autonomy, benefits society as surely as political expression does, although in a materially different way.

The Article proceeds in three parts. The first part establishes both the wisdom and the difficulty of focusing First Amendment doctrine on political speech. It reprises the theoretical case for a democracy-focused First Amendment and substantiates that case by describing the government's campaign against political dissent since the 2001 terrorist attacks. It then discusses the cost for nonpolitical expression of a First Amendment limited to protecting political speech. Finally, it describes and criticizes First Amendment theorists' prior attempts to minimize that cost. The Article's second part examines *Lawrence v. Texas* in the context of the Court's previous substantive due process jurisprudence and explains how the *Lawrence* Court's innovations facilitate shifting constitutional protection of nonpolitical speech from the First Amendment to the Due Process Clause. The final part examines what difference a shift to due process protection would make for constitutional doctrine in three important, controversial areas of substantially nonpolitical speech: artistic and cultural expression, pornogra-

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phy, and commercial advertising. Shielding nonpolitical expression behind the Due Process Clause rather than the First Amendment would expand some aspects of nonpolitical speech protection beyond their present scope while diminishing others, and the shift would strengthen the theoretical bases for constitutionally shielding both political and nonpolitical speech.

I. THE PUBLIC RIGHTS THEORY OF  
EXPRESSIVE FREEDOM AND THE PROBLEM OF  
NONPOLITICAL SPEECH

A. WHY LIMIT THE FIRST AMENDMENT TO PROTECTING ONLY  
POLITICAL SPEECH?

1. Private Rights Versus Public Rights in Free Speech Theory

The dominant influence on the Supreme Court's First Amendment jurisprudence over the past three decades has been the private rights theory of expressive freedom.<sup>2</sup> The private rights theory treats the First Amendment as a guarantor of individual autonomy.<sup>3</sup> That emphasis on autonomy generates a formalist vision of expressive freedom.<sup>4</sup> A regulation or action raises a First Amendment concern whenever the government abridges expressive opportunities that individuals or entities secure in the private marketplace.<sup>5</sup> Although present free speech doctrine rests on a concern for personal autonomy, the doctrine says little about what autonomy is or why autonomy matters; rather, it simply presumes that speaking reflects an important exercise of autonomous will. The private rights theory casts freedom of speech as a negative right rather than identifying any affirmative purpose of expressive freedom. Accordingly, it extends First Amendment protection to all expression without regard to category. Because such broad protection threatens to limit a wide range of government authority, the private rights theory employs a balancing methodology, mani-

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2. For a detailed portrayal of the private rights theory, see Gregory P. Magarian, *Regulating Political Parties Under a "Public Rights" First Amendment*, 44 WM. & MARY L. REV. 1939, 1947–59 (2003) [hereinafter Magarian, *Public Rights*].

3. For further discussion of the idea of autonomy that animates the private rights theory, see *infra* notes 130–33 and accompanying text.

4. See Magarian, *Public Rights*, *supra* note 2, at 1954–56.

5. See *id.* at 1957–58.

fest in the Supreme Court's familiar framework of tiered means-ends scrutiny, which allows many government restrictions on speech to survive First Amendment review.<sup>6</sup>

The Supreme Court frequently recites the aphorism that political expression has special significance under the First Amendment.<sup>7</sup> Its decisions, however, have paved the way for the present governmental assault on political dissent<sup>8</sup> by demonstrating how the private rights theory's balancing methodology serves to validate restrictions on political speech. In its most blatant use of balancing to enforce political orthodoxy, the Court in *Barenblatt v. United States* upheld an academic's conviction for refusing to testify before Congress about his past political associations.<sup>9</sup> Other decisions have turned on the Court's subjecting speech restrictions deemed content-neutral, and restrictions that apply to speech on government property not traditionally open for expressive activity, to more lenient judicial review than it imposes on content-based regulations of speech on private property or in "public forums." Illustrative is *Clark v. Community for Creative Non-Violence*, in which advocates for increased government attention to the problem of homelessness

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6. See *id.* at 1958–59. Frederick Schauer has explained this sort of balancing imperative in rights jurisprudence: "The broader the scope of the right, the more likely it is to be weaker, largely because widening the scope increases the likelihood of conflict with other interests, some of which may be equally or more important." FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 134–35 (1982).

7. See, e.g., *Virginia v. Black*, 538 U.S. 343, 365 (2003) (emphasizing the need for First Amendment protection of cross burning that constitutes "core political speech"); *Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002) (claiming that "speech about the qualifications of candidates for public office" is "a category of speech that is 'at the core of our First Amendment freedoms'" (quoting *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 861 (8th Cir. 2001), *rev'd sub nom. White*, 536 U.S. at 788)); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386 (2000) (echoing a statement in *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (per curiam), that "the constitutional [First Amendment] guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office"); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186–87 (1999) (characterizing First Amendment protection as "at its zenith" for "core political speech" (quoting *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988))).

8. For a detailed discussion of recent government suppression of political debate, some of it sanctioned by federal courts, see *infra* Part I.A.2.

9. See 360 U.S. 109, 125–34 (1959). The *Barenblatt* Court struck the balance in the government's favor based on the importance of "inquiring into the extent to which the Communist Party has succeeded in infiltrating into our universities, or elsewhere, persons and groups committed to furthering the objective of overthrow [of the government]." *Id.* at 129.

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sought to dramatize their agenda by sleeping in tents erected in Lafayette Square Park, in view of the White House.<sup>10</sup> The Court, ignoring the distinctive impact of this form of political advocacy, allowed the government to suppress it under a regulation that restricted sleeping in national parks.<sup>11</sup> The private rights theory has allowed the Court to uphold restrictions on political expression in other cases by deeming a speaker's invocation of regulatory mandates to allow expression, and not a government-facilitated decision to restrict speech, as the "public" action subject to constitutional sanction. In *CBS v. Democratic National Committee*, for example, the Court rejected antiwar advertisers' First Amendment challenge to the major broadcast networks' refusal to sell them advertising time.<sup>12</sup> A plurality dismissed out of hand the idea that the networks' public licenses imbued them with quasi-governmental authority and thus First Amendment obligations.<sup>13</sup>

A series of First Amendment theorists beginning with Alexander Meiklejohn<sup>14</sup> has developed the public rights theory of expressive freedom,<sup>15</sup> an alternative vision of the Free Speech Clause that contrasts sharply with the private rights theory. The public rights theory views the free speech guarantee of the First Amendment not as a negative protection

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10. 468 U.S. 288, 291–92 (1984).

11. See *id.* at 293–99. To reach its result, the *Clark* Court applied a deferential species of intermediate scrutiny. See *id.* at 293–94 (stating that "restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information") (citations omitted). For a similar ruling in a different setting, see *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, which upheld restrictions on political groups' access to a public employee charity campaign on the ground that the campaign was government property and a "nonpublic forum." 473 U.S. 788, 805–06, 813 (1985).

12. 412 U.S. 94, 97, 132 (1973).

13. See *id.* at 121 ("Application of [First Amendment] standards to broadcast licensees would be antithetical to the very ideal of vigorous, challenging debate on issues of public interest.").

14. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960).

15. For a detailed portrayal of the public rights theory, see Magarian, *Public Rights*, *supra* note 2, at 1972–90. The most important contributors to the public rights tradition after Meiklejohn are Owen Fiss and Cass Sunstein. See Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987) [hereinafter Fiss, *Why the State?*]; Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992).



against government interference with personal autonomy but rather as a Madisonian means to the end of democratic government.<sup>16</sup> Under the public rights theory, the central purpose of the Free Speech Clause is to ensure that members of the political community receive the information they need to make informed decisions about matters of public policy.<sup>17</sup> That purpose is both narrow and critically important. Accordingly, the public rights theory rejects the balancing methodology of the private rights theory in favor of a categorical approach that would give the First Amendment virtually absolute force against threats to political discourse.<sup>18</sup> The practical consequence of the public rights theory is that the government may restrict access to political expression—in Meiklejohn’s phrase, “the consideration of matters of public interest”<sup>19</sup>—only where necessary to safeguard political debate itself.<sup>20</sup> Writing in the late 1940s and early 1950s, he saw pressing national challenges that made pluralistic, participatory democracy critically important, even as governmental and societal pressures strangled the political dissent necessary for democratic engagement.<sup>21</sup> Treating political speech as the central object of expressive freedom ensures that the First Amendment will not fail in its essential purpose of fostering and facilitating self-government.<sup>22</sup>

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16. See Magarian, *Public Rights*, *supra* note 2, at 1983–84. Vicki Jackson has recently pointed out that a politically focused theory of expressive freedom draws support from the ascent, after the First Amendment’s enactment, of equal citizenship and popular election of representatives as central features in our constitutional order. See Vicki C. Jackson, *Holistic Interpretation, Comparative Constitutionalism, and Fiss-ian Freedoms*, 58 U. MIAMI L. REV. 265, 295 & n.119 (2003).

17. See Magarian, *Public Rights*, *supra* note 2, at 1983–85.

18. See *id.* at 1987–88.

19. MEIKLEJOHN, *supra* note 14, at 79.

20. See *id.* at 48–49. Meiklejohn drew this idea from Justice Brandeis’s concurrence in *Whitney v. California*, from which he approvingly quoted the proposition that “no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.” See 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *quoted in* MEIKLEJOHN, *supra* note 14, at 48.

21. For a detailed account of Meiklejohn’s intellectual process in developing his First Amendment theory, with particular attention given to the influence of anticommunism run amok, see ADAM R. NELSON, *EDUCATION AND DEMOCRACY: THE MEANING OF ALEXANDER MEIKLEJOHN 1872–1964*, at 263–95 (2001).

22. Eminent First Amendment theorists have suggested that, in addition to democracy and autonomy, expression’s essential role in the search for truth justifies constitutional expressive freedom. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing that the importance of

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Focusing the First Amendment on political speech, however, requires a critical trade-off. If the First Amendment is to provide virtually absolute protection for political discourse, then courts must categorically distinguish political from nonpolitical speech. For Meiklejohn, nonpolitical expression—art, entertainment, scientific inquiry—is “private speech,” outside the logical boundaries of First Amendment protection.<sup>23</sup> Like a sailor who throws excess weight off a sinking ship, Meiklejohn calls for sacrificing what he considers less essential categories of speech in order to ensure thorough protection of the one category—political speech—most integral to the nation’s democratic fortunes. Only a trade-off of broad protection, which encompasses a wide range of speech but subjects it to judicial balancing against countervailing regulatory priorities, for deep protection, limited to political speech but virtually absolute in its resistance to suppression, will lead to a First Amendment regime sufficient to protect vigorous political debate and dissent.<sup>24</sup>

No less distinguished a pair of strange bedfellows than Robert Bork and Cass Sunstein has elaborated the case for limiting the First Amendment’s scope to encompass only political speech, although their arguments follow widely divergent courses of reasoning. According to Bork, courts must focus the First Amendment on political expression in order to avoid the judicial activism that protecting any less constitutionally grounded categories of expression would entail.<sup>25</sup> For Sunstein, reserving the First Amendment’s core for political speech would both effectuate the Constitution’s central purpose of fostering

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testing assertions justifies First Amendment protection for speech); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 881–82 (1963) (including “attainment of truth” among principal justifications for expressive freedom). The public and private rights theories offer normatively opposed ways of thinking about expressive freedom, with each taking account of the search for truth to the extent that search serves the ends of, respectively, collective political decision making or individual autonomy.

23. See MEIKLEJOHN, *supra* note 14, at 79–80 (discussing private speech generally); *id.* at 83–84 (characterizing scholarly pursuits, particularly in the sciences, as partially private); *id.* at 86–88 (criticizing commercial radio as reflecting private rather than public interests).

24. See *id.* at 78–79.

25. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971). Even as Bork advocates the centrality of political expression, he departs significantly from the public rights theory by endorsing criminalization of speech that advocates forcible overthrow of the government. See *id.*

public deliberation and leave speech that hinders the development of popular sovereignty open to certain kinds of regulation.<sup>26</sup> Although Bork and Sunstein make forceful arguments for elevating political speech to First Amendment primacy, neither has put a dent in the Court's commitment to the private rights theory. One reason for their lack of influence is their inability to match the historical urgency of Meiklejohn's McCarthy-era plea for political openness: Bork's article appeared in 1971, during a golden age of judicial support for political dissent,<sup>27</sup> while Sunstein wrote in 1992, amid an era of relative national calm.

## 2. The Current Surge in Suppression of Political Speech

The terrorist attacks of September 11, 2001, set events into motion that buttress the public rights theory's call to circle the First Amendment's wagons around political speech. Our government's war on terrorism has fostered a climate of hostility toward political dissent in the United States unseen since Meiklejohn's time. Elsewhere I have documented the recent increase in nongovernmental institutions' suppression of political debate and dissent.<sup>28</sup> In the more traditional zone of First Amendment concern, federal and state law enforcement officials since 2001 have dramatically increased their efforts to intimidate, marginalize, and silence political dissenters. These efforts have chilled dissent and exerted enormous pressure toward political conformity. A statement by the California Anti-Terrorism Information Center exemplifies the present atmosphere: "[I]f you have a protest group protesting a war where the cause that's being fought against is international terrorism, you might have terrorism at that protest . . . . You can almost

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26. See Sunstein, *supra* note 15, at 305.

27. That year brought the most profound and farthest reaching majority opinion the Supreme Court has ever delivered about the value of speech generally and political dissent in particular. See *Cohen v. California*, 403 U.S. 15, 20–21, 26 (1971) (reversing on First Amendment grounds the conviction of a man who displayed a jacket bearing the words "Fuck the Draft" in a county courthouse; noting that the defendant's speech did not constitute "fighting words"; and rejecting an asserted state interest in protecting the sensibilities of the public, noting that an observer could simply "avert[] their eyes").

28. See Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 115–27 (2004) [hereinafter Magarian, *Wartime Debate*].

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argue that a protest against that is a terrorist act.”<sup>29</sup> In the few instances when federal courts have entertained First Amendment challenges to the government’s recent attacks on political dissent, they have employed the balancing methodology of the private rights theory to justify those attacks.<sup>30</sup> Most muffled dissenters have never even gone to court, many certainly because of the costs of litigation but others, no doubt, because they have concluded from the shape of present free speech doctrine that a court would only validate government censorship.<sup>31</sup>

Law enforcement began to display increased antipathy toward political protestors in November 1999, when Seattle police greeted protestors against a World Trade Organization meeting with pepper spray, concussion grenades, and rubber bullets, and the mayor created a “no protest zone” around the Seattle Convention Center.<sup>32</sup> In the wake of the Seattle debacle, cities that host high-profile public events have routinely invoked law enforcement necessity to restrict protestors to distant, cramped ghettos—dubbed, in an Orwellian flourish that swallows irony like a black hole, “free speech zones.”<sup>33</sup> This tactic, which absurdly overreaches legitimate security needs, prevents dissenting voices from challenging the potent propaganda of major public spectacles and expanding public debate about important issues. During the 2000 Democratic National Convention, for example, the Los Angeles Police Department established a security perimeter around the Staples Center that kept protestors 260 yards away from convention delegates.<sup>34</sup> In that case, however, a federal judge ruled the perimeter unconstitu-

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29. Michelle Goldberg, *Outlawing Dissent*, SALON.COM, Feb. 11, 2004, <http://archive.salon.com/news/feature/2004/02/11/cointelpro/print.html> (quoting Mike Van Winkle, spokesman for the California Anti-Terrorism Information Center).

30. See *Coal. to Protest the Democratic Nat’l Convention v. City of Boston*, 327 F. Supp. 2d 61, 66–76 (D. Mass. 2004), *aff’d sub nom.* Bl(a)ck Tea Soc’y v. City of Boston, 378 F.3d 8, 15 (1st Cir. 2004); *Nat’l Council of Arab Ams. v. City of N.Y.*, 331 F. Supp. 2d 258, 258, 265–66 (S.D.N.Y. 2004).

31. For a discussion of present free speech doctrine’s insufficient protection of political debate and dissent beyond the incidents discussed in this section, see *supra* notes 7–13 and accompanying text.

32. See Patrick F. Gillham & Gary T. Marx, *Complexity and Irony in Policing and Protesting: The World Trade Organization in Seattle*, 27 SOC. JUST. 212, 217 (2000).

33. Dave Lindorff, *Keeping Dissent Invisible*, SALON.COM, Oct. 16, 2003, [http://archive.salon.com/news/feature/2003/10/16/secret\\_service/print.html](http://archive.salon.com/news/feature/2003/10/16/secret_service/print.html).

34. *Serv. Employees Int’l Union v. City of L.A.*, 114 F. Supp. 2d 966, 968 (C.D. Cal. 2000).

tional, finding its size and around-the-clock enforcement not narrowly tailored to the government's interest in public safety.<sup>35</sup> That decision reflects what we usually assume to be the axiomatic First Amendment protection of political protest.<sup>36</sup>

Unfortunately, the September 11 attacks eroded courts' resolve against antiprotest measures. In July 2004, two protest groups requested a preliminary injunction to prevent the City of Boston from designating a 300-foot by 90-foot space under abandoned subway tracks as the "free speech zone" for the 2004 Democratic National Convention.<sup>37</sup> The zone was "surrounded by two rows of concrete jersey barriers," each topped with an eight-foot-high chain-link fence covered in tightly woven mesh fabric.<sup>38</sup> Looser mesh netting attached the top of the fence to the subway tracks above, which were wrapped in razor wire.<sup>39</sup> A federal judge described the space as "a grim, mean, and oppressive space" that created an impression "of an internment camp" or "a holding pen where potentially dangerous persons are separated from others."<sup>40</sup> He stressed that the design of the zone "is an offense to the spirit of the First Amendment[,] . . . a brutish and potentially unsafe place for citizens who wish to exercise their First Amendment rights."<sup>41</sup> Nonetheless, he refused to enjoin the zone, citing the constraints of the physical location and law enforcement's safety concerns as barriers to a solution that would "vindicate plaintiffs' First Amendment rights."<sup>42</sup> Less than a month later, another federal judge sustained the New York City Parks Department's decision to deny the National Council of Arab Americans a permit to protest on the Great Lawn during the 2004 Republican National Convention.<sup>43</sup> Although the court acknowledged the site's symbolic

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35. See *id.* at 971 (holding that a designated security zone unconstitutionally infringed protestors' First Amendment rights).

36. See, e.g., *Cohen v. California*, 403 U.S. 15, 26 (1971) (invoking the First Amendment to overturn the conviction of an antidraft protestor for wearing a "Fuck the Draft" jacket in a courthouse).

37. *Coal. to Protest the Democratic Nat'l Convention v. City of Boston*, 327 F. Supp. 2d 61, 66 (D. Mass. 2004), *aff'd sub nom. Bal(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8, 15 (1st Cir. 2004).

38. *Id.* at 67.

39. *Id.*

40. *Id.* at 67, 74–75.

41. *Id.* at 76.

42. *Id.*

43. See *Nat'l Council of Arab Ams. v. City of N.Y.*, 331 F. Supp. 2d 258, 268 (S.D.N.Y. 2004) (characterizing the defendants' interest in maintaining

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value for the protestors, it held that the government's interest in maintaining the park outweighed their interest in symbolic expression.<sup>44</sup>

Venturing outside their cages has gotten protestors arrested. In October 2003, federal agents arrested a retired steelworker and his sister after they refused to move their anti-Bush sign to a designated "free speech area" at a campaign rally in Pittsburgh.<sup>45</sup> Based on this and numerous similar incidents, the ACLU filed suit against the Secret Service, contending that segregating protestors violated their constitutional rights.<sup>46</sup> Although the Secret Service pledged to discontinue segregating protestors,<sup>47</sup> the practice continues. When President Bush appeared at the West Virginia Capitol for a July 4, 2004 campaign rally, police arrested a young couple wearing anti-Bush t-shirts and charged them with trespassing—on public property.<sup>48</sup> In September 2004, a woman wearing a t-shirt stenciled with "President Bush You Killed My Son," to protest her son's death in Iraq, shouted questions at First Lady Laura Bush during a campaign speech.<sup>49</sup> New Jersey police arrested her for defiant trespass even though she said she had a ticket to attend the rally.<sup>50</sup> In other cases, people seeking to attend

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and managing a public park as a significant government interest).

44. See *id.* at 258, 265–66 (recognizing the plaintiffs' belief that the location was symbolic but denying the plaintiffs' request for a preliminary injunction due to the doctrine of laches and the plaintiffs' failure to show a likelihood of success on the merits).

45. Lindorff, *supra* note 33 (documenting a protestor's arrest for disorderly conduct when he refused to relocate to a segregated area behind a chain-link fence to display a sign that read "The Bushes must love the poor—they've made so many of us").

46. See *id.* (describing ACLU findings of at least seventeen similar incidents and an ACLU suit against the Secret Service).

47. See Jennifer Bundy, *Couple Arrested for Wearing Anti-Bush T-shirts to W. Va. Event Sues Federal Officials*, N. COUNTY TIMES, Sept. 14, 2004, available at [http://www.nctimes.com/articles/2004/09/14/news/nation/16\\_51\\_349\\_14\\_04.prt](http://www.nctimes.com/articles/2004/09/14/news/nation/16_51_349_14_04.prt) (noting that the Secret Service agreed to discontinue its segregation policy).

48. *Id.*

49. *Soldier's Mom Interrupts Laura Bush's Speech*, CNN.COM, Sept. 20, 2004, <http://www.cnn.com/2004/ALLPOLITICS/09/17/bush.protester/index.html>. The Secret Service contemplated whether the woman, Sue Niederer, had violated a federal law banning threats to kill the president when she told an online magazine that "she wanted to 'rip the president's head off.'" *Secret Service Reviews Comments By Dead Soldier's Mom*, WNBC.COM, Sept. 22, 2004, <http://www.wnbc.com/print/3751305/detail.html>.

50. *Soldier's Mom Interrupts Laura Bush's Speech*, *supra* note 49.

speeches by President Bush have reported being ejected or barred simply because of their perceived opposition to administration policies.<sup>51</sup>

Government officials since the 2001 attacks have also used increasingly aggressive investigation and questioning to intimidate people who express dissenting political views. In November 2001, FBI and Secret Service agents appeared at a small Houston art museum and interrogated a curator for over an hour about a new exhibit called Secret Wars, which focused on covert government operations.<sup>52</sup> In November 2003, the U.S. Attorney's Office in Iowa served Drake University with a subpoena demanding information about an on-campus antiwar demonstration sponsored by the University's National Lawyers' Guild chapter.<sup>53</sup> The government claimed the subpoena was necessary for the investigation of a single trespassing incident on nearby National Guard property.<sup>54</sup> Only mounting public pressure led the U.S. Attorney to withdraw the subpoena in February 2004.<sup>55</sup> FBI officials have interrogated political demonstrators in advance of several public events, including the 2004 Democratic and Republican National Conventions.<sup>56</sup> The Department of Justice has also investigated people associated with Internet sites the government deems subversive of U.S. interests.<sup>57</sup> Relying extensively on its powers under the U.S.A. Patriot Act,<sup>58</sup> the Department has charged website owners

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51. See Ron Hutcheson, *Bush Backers Allegedly Keep Dissenters Away*, PHILA. INQUIRER, Mar. 31, 2005, at A4 (discussing the ejection of Iraq War opponents in Denver, Colorado, and blacklisting of Democrats in Fargo, North Dakota).

52. Kris Axtman, *Political Dissent Can Bring Federal Agents to Door*, CHRISTIAN SCI. MONITOR, Jan. 8, 2002, at 1.

53. Monica Davey, *Subpoenas on Antiwar Protest Are Dropped*, N.Y. TIMES, Feb. 11, 2004, at A18 (discussing a subpoena issued to Drake University for participant and content information about a National Lawyers' Guild-sponsored antiwar forum).

54. *Id.*

55. *See id.*

56. See Eric Lichtblau, *F.B.I. Goes Knocking for Political Troublemakers*, N.Y. TIMES, Aug. 16, 2004, at A1 (discussing FBI interviews of "past protestors and their friends and family members" in six states in weeks prior to both 2004 political conventions).

57. Eric Lipton & Eric Lichtblau, *Online and Even Near Home, a New Front Is Opening in the Global Terror Battle*, N.Y. TIMES, Sept. 23, 2004, at A12.

58. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (U.S.A. Patriot) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

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whose sites contain incendiary information with “provid[ing] ‘expert advice or assistance’” to terrorists.<sup>59</sup> Other objects of FBI and Secret Service attention have included a middle-aged Californian who criticized President Bush’s ties to oil companies during a conversation at his gym<sup>60</sup> and a North Carolina college freshman who displayed a poster in her dorm room that criticized President Bush’s record on capital punishment as governor of Texas.<sup>61</sup>

Numerous people who have mounted peaceful protests against the present government have paid for their efforts in blood, liberty, or positions in government institutions. In November 2001, the School of the Americas, a controversial operation that trains foreign nationals in military tactics, cracked down on an annual, nonviolent demonstration at Fort Benning, claiming the protest “was not appropriate during the war on terrorism.”<sup>62</sup> Although the event remained nonviolent, law-enforcement officials arrested and prosecuted dozens of protestors on trespassing charges.<sup>63</sup> A year later, Miami police attacked protestors who marched in opposition to a Free Trade Area of the Americas meeting.<sup>64</sup> When police announced over a bullhorn that the demonstration would continue only if it re-

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59. Lipton & Lichtblau, *supra* note 57. In 2003, the government leveled such charges against Sami Omar al-Hussayen, a recently emigrated PhD candidate, after he established websites that were devoted to Middle East news and cheered suicide attacks. *See id.* A judge allowed the case to reach a jury. *See id.* Despite scouring “files and files and files of evidence,” the jurors acquitted al-Hussayen because they could find no evidence that he was affiliated with a terrorist organization. *Id.* (quoting a juror). Similar charges are pending against a British citizen, but British authorities have so far refused to extradite the defendant to the United States. *See id.* (discussing charges pending against Babar Ahmad in federal district court in Connecticut).

60. *See* Axtman, *supra* note 52.

61. *See id.* For a discussion of other recent instances in which federal law enforcement officers have investigated or pressured people who displayed or created works that satirized the Bush administration, see Lauren Gilbert, *Mocking George: Political Satire as “True Threat” in the Age of Global Terrorism*, 58 U. MIAMI L. REV. 843, 847–53 (2004).

62. Alisa Solomon, *Things We Lost in the Fire*, VILLAGE VOICE, Sept. 11–17, 2002, at 32 (quoting Father Roy Bourgeois, founder of School of the Americas Watch).

63. *Id.*

64. *See* Ben Manski, *Massacre in Miami? It Was a Defeat for Protestors*, CAP. TIMES, Nov. 27, 2003, at 13A. Miami police had prepared for the meeting by stockpiling riot gear, erecting “an 8-foot high security fence around the protest zone,” and setting up a “rumor control” hotline to field calls about alleged protests. Tamara Lush, *Trade Talks Put Miami on Edge*, ST. PETERSBURG TIMES, Nov. 17, 2003, at 1A.



mained peaceful, a protestor responded, "Does that include police violence?"<sup>65</sup> The police replied with batons, tear gas, rubber bullets, pepper spray, and concussion grenades.<sup>66</sup> The congressionally funded United States Institute of Peace forced a conflict resolution trainer to resign because of her public statements criticizing U.S. foreign policy.<sup>67</sup> The University of South Florida fired a tenured professor for harshly criticizing Israel.<sup>68</sup> A West Virginia high school suspended a student for wearing a t-shirt that said "Racism, Sexism, Homophobia, I'm So Proud of People in the Land of the So-Called Free," and the West Virginia Supreme Court upheld the suspension.<sup>69</sup> These actions took place despite the First Amendment's ostensible protection of political expression by public employees<sup>70</sup> and students.<sup>71</sup> The Supreme Court has held that infiltration and monitoring of peaceful political groups violates political dissenters' First Amendment right of political association.<sup>72</sup> It also offends First Amendment principles by casting the very act of opposing the government as legally suspect, and—if the government strategically publicizes the monitoring—by chilling expression.<sup>73</sup> Nonetheless, government infiltration and monitoring of dissenters, so infamous from the days of McCarthyism and COINTELPRO,<sup>74</sup> has reemerged during the present campaign against terrorism. After the September 11 attacks, Attorney General John Ashcroft loosened guidelines for federal investigations in order to ensure that "if there is a rally of people who

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65. Manski, *supra* note 64.

66. *See id.*

67. *See* Matthew Rothschild, *The New McCarthyism*, PROGRESSIVE, Jan. 2002, at 19.

68. *See* Solomon, *supra* note 62.

69. *See* Rothschild, *supra* note 67, at 20.

70. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 565, 574 (1968) (holding that the First Amendment barred the board of education from firing a teacher for making public statements criticizing the board's policies).

71. *See* Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 514 (1969) (holding that the First Amendment barred a public school from suspending students for wearing black armbands to protest the Vietnam War).

72. *Cf.* NAACP v. Alabama, 357 U.S. 449, 466 (1958) (rejecting on First Amendment grounds a state's demand for a civil rights group's membership list).

73. *See* Peter P. Swire, *The System of Foreign Intelligence Surveillance Law*, 72 GEO. WASH. L. REV. 1306, 1319 (2004) (discussing the chilling effect on First Amendment rights of government surveillance and infiltration of political dissenters).

74. *See* Goldberg, *supra* note 29.

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are criticizing the United States and its policies and saying that the United States will someday perhaps be destroyed because of that, the FBI agent can go and listen to what's being said."<sup>75</sup> In 2003, the FBI encouraged local law enforcement officials to monitor antiwar groups and political protests for signs of terrorist activity,<sup>76</sup> and the federal government has poured funding into local "red squads."<sup>77</sup> When an FBI employee argued that those mandates confused protected speech with illegal activity, the Department of Justice's Office of Legal Counsel declared the activity constitutionally appropriate.<sup>78</sup> Since then, groups across the nation, including the Colorado Coalition Against the War, the American Friends Service Committee, and Peace Fresno have reported undercover officers infiltrating their organizations.<sup>79</sup>

In an effort to publicize government assaults on political dissent, the ACLU and the Center for National Security Studies filed Freedom of Information Act requests for statistics regarding the Justice Department's post-September 11 activities.<sup>80</sup> When the Department denied each request, the groups filed suit in federal district court; in each case, the court sided with the government.<sup>81</sup> One federal judge upheld the Justice Department's refusal to release general statistics regarding its use of various surveillance and investigatory tools authorized by the Patriot Act, holding that the Department's interest in protecting national security justified secrecy.<sup>82</sup> Another federal judge held that the Patriot Act's national security exemption protected the Department's refusal to turn over statistics regarding the frequency of its requests for "tangible things in an

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75. *Id.* (quoting Attorney General Ashcroft in a 2002 interview).

76. *See* Lichtblau, *supra* note 56 (discussing FBI requests to local law enforcement agencies regarding monitoring of political dissenters and an internal complaint filed by an FBI employee citing concerns about the requests' infringement of constitutional free speech protections).

77. *See* Solomon, *supra* note 62 (discussing government infiltration tactics).

78. *See* Lichtblau, *supra* note 56 ("Given the limited nature of such public monitoring, any possible 'chilling' effect caused by the bulletins would be quite minimal and substantially outweighed by the public interest in maintaining safety and order during large-scale demonstrations." (quoting a Department of Justice opinion)).

79. *See* Goldberg, *supra* note 29.

80. *See* ACLU v. U.S. Dep't of Justice, 321 F. Supp. 2d 24, 26 (D.D.C. 2004); ACLU v. U.S. Dep't of Justice, 265 F. Supp. 2d 20, 21 (D.D.C. 2003).

81. *See* 321 F. Supp. 2d at 38; 265 F. Supp. 2d at 34–35.

82. *See* 265 F. Supp. 2d at 31.

‘authorized investigation.’”<sup>83</sup> The court cited longstanding deference to the Executive Branch regarding national security matters and asserted judicial incompetence to “second-guess the executive’s judgment” on national security.<sup>84</sup> Public access to information about the workings of government is essential in a democratic society. These decisions, however, validated what has been an unprecedented government effort to shield such information from public scrutiny.<sup>85</sup>

The First Amendment is supposed to ensure that the news media can vigorously pursue and report news about government actions and proceedings.<sup>86</sup> But the Bush administration, through control of access to information and occasional overt pressure, has eviscerated the news media’s traditional watchdog role, a process that media corporations’ frequent self-censorship has made shamefully easy.<sup>87</sup> One particularly important instance of heightened government secrecy is a federal policy, issued within days of the 2001 attacks and altering decades of past practice, of reflexively closing deportation hearings on national security grounds.<sup>88</sup> Under that policy, the Depart-

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83. See 321 F. Supp. 2d at 26, 37.

84. *Id.* at 30.

85. See Eric Lichtblau, *Government Shrinking Access to Information*, MILWAUKEE J. SENTINEL, Nov. 22, 2001, at 28A (describing the general increase in government secrecy in the wake of the September 11 attacks); *On the Public’s Right To Know: The Day Ashcroft Censored Freedom of Information*, S.F. CHRON., Jan. 6, 2002, at D4 (discussing a memorandum from Attorney General John Ashcroft that “vigorously urged federal agencies to resist most Freedom of Information Act requests made by American citizens”).

86. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (holding that “the right [of the press and public] to attend criminal trials is implicit in the guarantees of the First Amendment”); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (refusing to enjoin publication of the Pentagon Papers, leaked government documents related to national security).

87. See Magarian, *Wartime Debate*, *supra* note 28, at 117–21 (documenting instances of misinformation and suppression of information by U.S. news media since the 2001 terrorist attacks). The Bush administration’s unprecedented promotion of its policies via Potemkin journalists—including secret payments to opinion commentators, production and distribution of fake television news segments, and issuance of White House press credentials to an incognito conservative activist—has exacerbated the failures of real media outlets. See Frank Rich, *The White House Stages Its “Daily Show,”* N.Y. TIMES, Feb. 20, 2005, at B1 (describing the Bush administration’s disinformation tactics).

88. See Directive of Michael Creppy, Chief Immigration Judge, to All Immigration Judges and Court Administrators (Sept. 21, 2001), <http://news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf> [hereinafter Creppy Di-

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ment of Justice holds unfettered discretion to designate any immigration proceeding a “special interest” matter, based on a belief that the immigrant “might have connections with, or possess information pertaining to, terrorist activities against the United States.”<sup>89</sup> A “special interest” designation requires courts to seal the case file; remove the case from the docket; and bar the detainee’s family, visitors, and reporters from the proceedings.<sup>90</sup> This policy has allowed the government to decide the fates of hundreds of immigrants without the accountability that open proceedings ensure.<sup>91</sup> The United States Court of Appeals for the Third Circuit has upheld the policy against constitutional challenge,<sup>92</sup> although the Sixth Circuit has disagreed;<sup>93</sup> meanwhile, the D.C. Circuit has upheld the government’s refusal even to provide a count of hearings closed under the policy.<sup>94</sup>

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rective]. The Creppy Directive altered a longstanding policy that deportation proceedings were open to the public. *See* *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 701 (6th Cir. 2002) (“Since 1965, INS regulations have explicitly required deportation hearings to be presumptively open.”).

89. *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 202 (3d Cir. 2002) (quoting a declaration by Dale L. Watson, Executive Assistant Director for Counterterrorism and Counterintelligence at the FBI), *cert. denied*, 538 U.S. 1056 (2003).

90. *See* Creppy Directive, *supra* note 88.

91. An estimated 600 detainees endured closed hearings through mid-2003. *See* Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. 95, 95–96 (2004) (citing a figure provided by Solicitor General Theodore Olsen in a brief opposing writ of certiorari in *North Jersey Media Group*). Despite evidence that almost none of the people subjected to closed deportation hearings have terrorist connections, the Department of Justice has continued to close hearings. *See id.* at 96 & n.8 (noting the Department’s acknowledgment that most detainees did not have information regarding terrorist activities). The Department has publicly suggested it may reconsider the Creppy Directive. *See* *Behind Closed Doors*, INT’L HERALD TRIB., May 31, 2003, at 6 (quoting the Department as saying that procedures for closed hearings might “likely be revised”). At this time, however, the policy appears unchanged.

92. *See N. Jersey Media Group*, 308 F.3d at 221 (holding the Creppy Directive constitutional under the analysis set forth in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980)).

93. *See Detroit Free Press*, 303 F.3d at 701 (holding the Creppy Directive unconstitutional under the analysis set forth in *Richmond Newspapers*, 448 U.S. at 575).

94. *See Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 921 (D.C. Cir. 2003) (sustaining the Department of Justice’s right to deny a Freedom of Information Act request concerning INS detainees), *cert. denied*, 540 U.S. 1104 (2004).

The threat of unaccountable deportation does not, of course, represent our government's only recent assault on resident foreign nationals. The Court has held that the First Amendment protects the expressive rights of noncitizens,<sup>95</sup> and this protection increases the presence of diverse viewpoints in domestic political debate.<sup>96</sup> Those considerations, however, have not stopped the government from using the exceptional leverage it holds over foreign nationals in the United States to suppress their political association and expression.<sup>97</sup> Government actions, most prominently the broad and seemingly arbitrary practice of questioning and often detaining noncitizens for alleged associations with asserted terrorists, have effectively chilled immigrant communities from speaking out on political issues that strongly affect their interests.<sup>98</sup>

Since the 2001 terrorist attacks, the First Amendment has failed in its essential task of protecting political dissent. That failure provides powerful support for the trade-off urged by the public rights theory of expressive freedom: narrow the scope of the Free Speech Clause to cover only political expression in order to deepen protection of that most essential category of speech by eliminating the balancing of political expression against government regulatory interests.<sup>99</sup> That trade-off would improve upon the present state of constitutional protection for political debate and dissent in numerous ways. First, the public rights theory would compel courts to extend political expression far greater protection against government regulation than it currently enjoys. Unless the government could justify a re-

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95. "Freedom of speech and of press is accorded aliens residing in this country." *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (citing *Bridges v. California*, 314 U.S. 252 (1941), which overturned a contempt-of-court conviction of an alien labor leader that rested on a telegram to the Secretary of Labor about a pending case).

96. *Cf. MEIKLEJOHN*, *supra* note 14, at 119 (contending "that unhindered expression must be open to non-citizens, to resident aliens, to writers and speakers of other nations, to anyone, past or present, who has something to say which may have significance for a citizen who is thinking of the welfare of this nation").

97. See Solomon, *supra* note 62 (discussing the broad powers of the Attorney General to identify and detain noncitizens suspected of "terrorist" ties under the U.S.A. Patriot Act). Many Muslim Americans fear even appearing at community events. See, e.g., *id.* (discussing decreased attendance at a Brooklyn Pakistani community festival).

98. See *id.*

99. See *supra* notes 14–27 and accompanying text.

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straint on political debate as needed to protect political debate itself, the public rights theory would impose a rigorous presumption against the restraint. Second, more dissenters who faced government sanction would have reason to avail themselves of judicial process, because courts' adjudications of First Amendment cases would send a consistent message that our legal system took constitutional protection of political debate seriously. Third, the public rights theory's emphasis on robust political debate as the necessary bottom line of First Amendment doctrine would justify courts in blocking even some non-governmental constraints on public political debate, at least in wartime.<sup>100</sup> Fourth, that same bottom-line view of expressive freedom would produce a more open and dynamic political process that would widen the variety of viewpoints present in public political debate.<sup>101</sup>

Making political speech the exclusive object of First Amendment protection would bring impressive benefits. The public rights theory's problem, however, is that its proposed trade-off of broadly protecting all speech for deeply protecting only political speech entails steep, arguably intolerable costs in exposure of nonpolitical speech to official suppression.

#### B. PROBLEMS WITH PROTECTING ONLY POLITICAL SPEECH UNDER THE FIRST AMENDMENT

##### 1. Distinguishing Political Speech

Although this Article concentrates on the doctrinal consequences of limiting the First Amendment to protection of political speech,<sup>102</sup> the discussion will benefit from consideration of a logically prior problem: the need to distinguish political from nonpolitical speech. Meiklejohn acknowledged that "[t]he human relations involved in the distinction between the general welfare and individual advantage are deeply and permanently perplexing."<sup>103</sup> Is art political? Does the arguably transgressive character of pornography render it political? What about commercial information that affects important consumer decisions? Even if any or all of these categories of speech are not inher-

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100. See Magarian, *Wartime Debate*, *supra* note 28, at 150–68.

101. See Magarian, *Public Rights*, *supra* note 2, at 2010–60.

102. See *infra* Part I.B.2.

103. MEIKLEJOHN, *supra* note 14, at 81.

ently political, do they acquire political character whenever attempts at official censorship make them objects of political controversy?<sup>104</sup>

Line-drawing problems inhere in the necessary task of providing a theoretical explanation for expressive freedom.<sup>105</sup> The dominant private rights theory of expressive freedom,<sup>106</sup> which rejects categorization of types of speech, nevertheless entails at least three problematic exercises in line drawing. First, because some concept must bound the First Amendment's constraint on government authority, the private rights theory's disdain for categorical distinctions requires it to stake a great deal on the notoriously elusive distinction between speech and action.<sup>107</sup> Second, the private rights theory's balancing methodology requires identifying and comparing distinct regulatory and expressive values.<sup>108</sup> This balancing process impels courts both to assess the relative importance of different sorts of expressive conduct<sup>109</sup> and to determine whether a government regulatory interest somehow outweighs a conceptually incommensurable expressive interest.<sup>110</sup> Third, the private rights theory's nega-

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104. Critics of the theory have repeatedly noted this problem. Objections to Meiklejohn's distinction between public and private speech immediately formed the leading attack on his First Amendment theory. See NELSON, *supra* note 21, at 270–74 (summarizing and discussing early criticisms). Leading examples include Robert C. Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1117 (1993) (arguing that Meiklejohn “violates th[e] necessary indeterminacy of public discourse” by limiting what can count as political); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 596–97 (1982) (criticizing Meiklejohn's line drawing); Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1225–39 (1983) (arguing against a distinction between political and commercial speech).

105. For the leading explanation of the need for some theory to ground free speech doctrine, see Emerson, *supra* note 22, at 877–78.

106. See *supra* notes 2–6 and accompanying text (describing the private rights theory).

107. See, e.g., *Wisconsin v. Mitchell*, 508 U.S. 476, 487–88 (1993) (upholding a penalty enhancement for racially motivated crime because the enhancement targeted “bias-inspired conduct” rather than expression).

108. See *supra* notes 7–13 and accompanying text.

109. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 20–21 (1976) (per curiam) (concluding that political contributions have less expressive value than political expenditures).

110. See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357–70 (1997) (assessing minor parties' expressive interest in having the option to choose another party's nominee as its own “fusion” nominee, assessing the state's asserted political stability interests in banning fusion candidacies, and

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tive model of expressive rights places defining emphasis on a rigid distinction between the ephemeral categories of “public” and “private.”<sup>111</sup> Resolving any First Amendment theory’s line-drawing problems requires difficult judgments about whatever factors the theory emphasizes in defining expressive freedom.

Theorists in the public rights tradition have tried to generate a strict definition of political speech. Meiklejohn defines the proper class of protected expression as limited to “speech which bears, directly or indirectly, upon issues with which voters have to deal . . . , to the consideration of matters of public interest.”<sup>112</sup> Sunstein “treat[s] speech as political when it is both intended and received as a contribution to public deliberation about some issue.”<sup>113</sup> These attempts to define political speech share two problems. First, they fail to achieve any clear, satisfying delineation. Meiklejohn’s “directly or indirectly,” Sunstein’s reliance on subjective intent and perception, and their shared emphasis on the uncertain notion of public affairs seem to preclude a stable understanding of which speech counts as “political.” Second, even if we could arrive at a fixed, stable definition of “political speech,” judicial reliance on that definition might stunt growth over time in our understanding of what concerns should become subjects of collective societal deliberation and resolution. Such a definition, for example, might have interfered with our society’s emerging awareness over the past half century of the relationship between sexual identity and political change.<sup>114</sup> Thus, a stable conception of “political speech” appears impossible at best and undesirable at worst.

Efforts to define political speech offer promise, however, if we resist the allure of stability and instead consider “politics” as a dynamic concept.<sup>115</sup> On this understanding, the category of

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concluding that the latter outweighed the former).

111. See Magarian, *Public Rights*, *supra* note 2, at 1956–58 (explaining the private rights theory’s reliance on the public-private distinction to vindicate a negative right to expressive freedom). For a thorough critique of the public-private distinction in the context of First Amendment doctrine, see Magarian, *Wartime Debate*, *supra* note 28, at 127–50.

112. MEIKLEJOHN, *supra* note 14, at 79.

113. Sunstein, *supra* note 15, at 304.

114. See generally GAY AND LESBIAN RIGHTS IN THE UNITED STATES: A DOCUMENTARY HISTORY (Walter L. Williams & Yolanda Retter eds., 2003) (discussing sexual minorities’ struggle for rights against the dominant views of society).

115. I have previously advocated a similar distinction in the practice of partisan politics in the United States. See Magarian, *Public Rights*, *supra* note



“political speech” attains distinction not lexically but functionally. Meiklejohn wrote much less about what political speech is than about what it does: it presents “squarely and fearlessly everything that can be said in favor of [governing] institutions, everything that can be said against them.”<sup>116</sup> In his foundational explanation of expressive freedom as a public right, “[t]he principle of the freedom of speech springs from the necessities of the program of self-government.”<sup>117</sup> Accordingly, a practical distinction of political speech transcends any single, abstract inquiry, requiring instead an ongoing examination that encompasses both theoretical inquiry and concrete adjudication.

Although the Supreme Court knows how to differentiate constitutional speech protection based on distinctions among explicit categories of speech,<sup>118</sup> it probably would implement the public rights theory most effectively not by attempting a rigid delineation of political speech but rather by examining in any given case whether a burden on speech undermined discourse best understood as concerning matters of public deliberation or, in contrast, undermined speech best understood as serving some individual’s interest in personal autonomy. The Court has shown an understanding of how to draw exactly this sort of distinction in more limited First Amendment contexts. In a defamation case, the court will afford a defendant’s allegedly defamatory statement heightened insulation from liability if the statement’s object is a “public official”<sup>119</sup> or a “public fig-

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2, at 1996–2003 (setting forth the dynamic party politics theory of political parties’ role in elections).

116. MEIKLEJOHN, *supra* note 14, at 77.

117. *Id.* at 27. Professor Fiss, another leading architect of the public rights theory, similarly advocates a “public debate principle” of expressive freedom, under which “[state] action is judged by its impact on public debate, a social state of affairs.” Fiss, *Why the State?*, *supra* note 15, at 786.

118. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761–70 (1976) (defining “commercial speech” as a category of expression entitled to less than full First Amendment protection); *Miller v. California*, 413 U.S. 15, 24 (1973) (defining “obscenity” as a category of unprotected speech); *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (defining incitement to imminent lawless action as a category of unprotected speech); *Watts v. United States*, 394 U.S. 705, 707 (1969) (defining “true threats” as a category of unprotected speech); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 268 (1964) (recognizing some defamation as a category of unprotected speech); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (defining “fighting words” as a category of unprotected speech).

119. *See Sullivan*, 376 U.S. at 270 (emphasizing the “profound national commitment to the principle that debate on public issues should be uninhibi-

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ure.”<sup>120</sup> The court has insulated public employees and publishers of sensitive information from adverse actions that targeted speech about matters of public concern.<sup>121</sup> In evaluating media regulations, the Court has permitted broadcast content requirements based at least in part on the idea that broadcasters, by virtue either of their public licenses<sup>122</sup> or their control over communication bottlenecks,<sup>123</sup> perform a special public function. All of these rules require functional assessments of the public importance of certain types or means of expression—the same sort of assessment a court would need to make if First Amendment jurisprudence shifted toward a focus on political expression.

The line between subjects of public and private concern disappears at some level of abstraction.<sup>124</sup> Certainly that line’s

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ted, robust, and wide-open” in applying a more stringent standard of proof to defamation actions brought by “public officials”).

120. See *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 154–55 (1967) (extending the *Sullivan* requirement for defamation judgments to cases brought by “public figures”).

121. See *Bartnicki v. Vopper*, 532 U.S. 514, 534–35 (2001) (rejecting the application of wiretap statutes to republication of illegally obtained information because “privacy concerns give way when balanced against the interest in publishing matters of public importance”); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571, 574–75 (1968) (overturning a school board’s firing of the plaintiff for speaking about “a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive”). Eugene Volokh asserted that “it shouldn’t be for courts to decide what is a matter of ‘public concern’ and what isn’t,” given that “[m]ost such matters of taste are left to individual speakers and listeners to determine.” Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 *Liquormart, and Bartnicki*, 40 *HOUS. L. REV.* 697, 747 (2003). Volokh’s position exemplifies the logical consequences of the private rights theory’s negative, purposeless conception of expressive freedom. See *supra* notes 2–6 and accompanying text.

122. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388–90 (1969) (upholding a federal requirement of equal broadcast time for opposing political positions based on a public need to allocate broadcast frequencies through public licenses).

123. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 656–57 (1994) (applying a lesser standard of First Amendment scrutiny to a federal “must carry” requirement for cable systems based on cable operators’ control over a large population’s access to an important source of information).

124. Eminent constitutional thinkers have cast the Supreme Court’s commitment to personal autonomy in *Lawrence v. Texas*, 539 U.S. 558 (2003), discussed *infra* Part II.A, as a means of advancing democratic ideals. See Jane S. Schacter, *Lawrence v. Texas and the Fourteenth Amendment’s Democratic Aspirations*, 13 *TEMP. POL. & CIV. RTS. L. REV.* 733, 734 (2004) (situating *Lawrence* in a line of Fourteenth Amendment cases concerned with “the culture

location is a necessary and proper subject for continual reassessment.<sup>125</sup> Understood functionally, however, political speech has both value and vulnerability distinct from those that attach to other categories of expression.<sup>126</sup> Some legal impediments to personal autonomy reflect political power differentials, but many do not, and the fact that democratic participation requires a measure of personal autonomy does not mean that all autonomy protections advance democratic deliberation. The public rights theory distinguishes the benefits of expression for democratic debate from its benefits for personal autonomy in order to ensure a functional, robust democratic system. The prospect of judicial determinations about the value of various forms of expression may appear troubling, but in this area, as in so many others, judges cannot decide anything without assessing the values at stake.<sup>127</sup> It is better to embody such

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and conditions of democracy"); Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1899 (2004) (positing that "the commitments we make to our principles and to one another, in the context of associations ranging from the most intimate to those with the polity as a whole, constitute the essential core of constitutionalism").

125. See Post, *supra* note 104, at 1116–17 (positing the "necessary indeterminacy of public discourse"). My understanding of expressive freedom owes much to Post's rich account of the depth to which democratic principles require public contention to extend. See *id.* at 1116 (maintaining that "public discourse must be conceptualized as an arena within which citizens are free continuously to reconcile their differences and to (re)construct a distinctive and ever-changing national identity"). My difference with Post goes to his complete trust in the economic marketplace as the sole conceivable mechanism for ensuring the freedom he extols. See *id.* at 1118–19 (rejecting involvement by public institutions in achieving the democratic aims of a Meiklejohn-derived First Amendment theory as "[m]anagerial" interference with "the value of autonomy"). Post dismisses what he identifies, in a term that still had bite in 1993, as "collectivist" doubts about the public-private distinction and the autonomous character of individual decisions in our society on the circular basis that those doubts threaten the conception of democracy he wishes to sustain. See *id.* at 1125–33. Post's dismissal ignores real threats that nongovernmental actors pose to democracy. It is far better to give courts a role in policing those actors than to let them police themselves.

126. See Magarian, *Wartime Debate*, *supra* note 28, at 105–15 (discussing the distinctive value and vulnerability of political debate compared to other speech).

127. See, e.g., Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9–13 (1979) (contending that judges are uniquely able to evaluate and balance competing constitutional values); Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 711 (1931) (calling for a realist theory of values and recognizing many approaches to juristic truth).

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evaluations in forthright, evolving doctrine than to pretend that they need not occur.

## 2. Defying the Consensus to Protect Nonpolitical Speech

The definitional problem aside, this Article addresses a deeper problem with confining expressive freedom under the First Amendment to political speech: the tension that pits the imperative to privilege politically valuable expression against ingrained judicial practice, social norms, and intellectual commitments that compel undifferentiated First Amendment protection for most categories of speech.

The public rights theory calls for privileging political speech under the First Amendment because political speech has unique value for democracy. Many people, however, believe all speech deserves an undifferentiated constitutional shield because all speech advances personal autonomy. That belief, which animates the private rights theory's directive to protect expression without regard to category, comports with the most common conception of constitutional rights. The impetus to protect individuals' autonomous behavior against government intrusion, subject in appropriate cases to superseding government regulatory interests, has deep roots in our legal tradition and exerts a powerful hold on our understanding.<sup>128</sup> Autonomy strikes most people as especially salient for expressive freedom because the act of speaking manifests the moral agency that defines an individual in relation to other people and to the broader community.<sup>129</sup>

The present Supreme Court has proclaimed unanimously "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."<sup>130</sup> Although the Court has done little to

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128. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 122 n.4 (3d ed. rev., Callaghan & Co. 1884) (1765) (describing natural rights and the limited role of government in preserving liberty); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 350 (Peter Laslett ed., student ed., Cambridge Univ. Press 1988) (1690) (proposing that the individual is willing to yield some freedom to government in order to preserve "the enjoyment of the property he has in [the state of nature]").

129. See C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 1014–15 (1997) (substantiating the common intuition that recognition of individuals' moral agency is essential to the formation of political community).

130. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995).

elaborate the positive value of expressive autonomy, numerous First Amendment theorists have built sophisticated accounts of expressive freedom around personal autonomy. Charles Fried states the essential claim: "Freedom of expression is properly based on autonomy: the Kantian right of each individual to be treated as an end in himself, an equal sovereign citizen of the kingdom of ends with a right to the greatest liberty compatible with the like liberties of all others."<sup>131</sup> C. Edwin Baker maintains that courts should understand the First Amendment to protect all speech that represents the autonomous exercise of the speaker's expressive capacity "because of the way the protected conduct fosters individual self-realization and self-determination without improperly interfering with the legitimate claims of others."<sup>132</sup> Martin Redish posits that the Free Speech Clause serves entirely to advance the value of "individual self-realization," which encompasses and supersedes the interest in a healthy democratic process.<sup>133</sup>

Some sorts of speech that have substantially or primarily nonpolitical value, notably pornography<sup>134</sup> and commercial speech,<sup>135</sup> defy consensus, leading to distinctly aberrant or in-

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131. Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992).

132. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978); see also Baker, *supra* note 129, at 982–87 (describing considerations of expressive autonomy that justify First Amendment protection of speech). Baker argues pointedly that the autonomy-based explanation for expressive freedom "is much more deeply intertwined with our normative commitments" than the democracy-based explanation. See *id.* at 1014–17.

133. See Redish, *supra* note 104, at 601–05 (explaining "individual self-realization" value in relation to democratic process value); see also Post, *supra* note 104, at 1119 (conceptualizing autonomy as a value that dictates a sphere of expressive freedom "within which heterogeneous versions of collective identity can be free continuously to collide and reconcile").

134. The incoherence of the Supreme Court's jurisprudence on pornography began with *Miller v. California*, 413 U.S. 15 (1973). In *Miller*, the Court defined a broad category of "patently offensive" sexually explicit speech by reference to "community standards" and declared the category outside the protection the First Amendment is supposed to accord to speech that offends the community. See *id.* at 24. In subsequent decisions, the Court effectively allowed the Federal Communication Commission (FCC) to ban scatological language over the radio airwaves, see *FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978), then struck down a congressional requirement that cable television providers scramble sexually explicit programming, see *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 826 (2000). This Article discusses a substantive due process approach to regulations of pornography *infra* Part III.B.

135. The Supreme Court has had difficulty even defining commercial

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coherent lines of First Amendment doctrine. But the Supreme Court has enforced a broad societal consensus that artistic and literary works deserve constitutional insulation from government interference without regard to their contribution, or lack thereof, to political debate.<sup>136</sup> Similarly, the Court's decisions reflect a broadly shared belief that the Constitution should protect categories of nonpolitical speech as varied as scientific inquiry,<sup>137</sup> frank discussions about sex and sexuality,<sup>138</sup> and charitable appeals.<sup>139</sup> Thus, the Court has consistently extended full First Amendment protection to those categories of speech.<sup>140</sup>

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speech. *Compare* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (defining commercial speech as "speech which does 'no more than propose a commercial transaction'" (quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973))), *with* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980) (defining commercial speech more broadly to include "expression related solely to the economic interests of the speaker and its audience"). The Court's approach to protecting commercial speech remains unstable and unsettled. *Compare* Cent. Hudson, 447 U.S. at 566 (announcing a four-part intermediate scrutiny standard for commercial speech cases), *with* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (plurality opinion) (maintaining that "[t]he mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them" and proposing more thorough protection for commercial speech in certain circumstances). This Article discusses a substantive due process approach to regulations of commercial speech *infra* Part III.C.

136. See, e.g., Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 115–16 (1991) (striking down a state regulation that imposed a financial burden on criminals who published books relating to their crimes as invalid under the First Amendment).

137. See, e.g., *Miller*, 413 U.S. at 24 (including "scientific value" among the safe harbors that bring otherwise unprotected "obscenity" within First Amendment protection).

138. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 878 (1997) (explaining that the Court's decision to invalidate a broad-based restriction on Internet content was partially based on the ground that the ban might encompass "discussions about prison rape or safe sexual practices").

139. See *Meyer v. Grant*, 486 U.S. 414, 422 n.5 (1988) (determining that solicitation of charitable appeals for funds is within the protection of the First Amendment); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 622 (1980) (holding that the First Amendment protects solicitation of contributions by charitable organizations).

140. I exclude religious expression from this list because the First Amendment specially protects religious expression, as well as action, through the Free Exercise Clause, at least in theory. *But see* *Employment Div. v. Smith*, 494 U.S. 872, 876–82 (1990) (limiting the prohibitive effect of the Free Exercise Clause to regulations that deliberately or discriminatorily burden religion). In fact, the Free Exercise Clause, by defining a basis for constitutional protection without distinguishing between speech and conduct, provides the

### C. UNSATISFACTORY SOLUTIONS TO THE NONPOLITICAL SPEECH PROBLEM

Prior advocates of the public rights theory have tried and failed to strike the delicate but necessary balance between preserving the theory's essence and honoring the societal consensus that nonpolitical speech deserves constitutional protection. These previous attempts have taken two principal forms: (1) expanding the category of political speech and (2) proposing alternative sources of constitutional protection for nonpolitical speech. The first approach, although useful to some extent, cannot fully address the autonomy concern without undermining the method and purpose of the public rights theory. Past attempts at the second approach have lacked force or coherence and have failed to embody the affirmative reasons why people favor constitutional protection of much nonpolitical speech. That second approach, however, points toward the newly viable substantive due process solution proposed in Part II.

#### 1. Expanding the Category of Political Speech

When a categorical method of distributing some benefit loses support because it excludes popular or sympathetic beneficiaries, a straightforward solution is available: expand the category. In party politics this is known as the "big tent" approach;<sup>141</sup> in the public policy arena, inclusion of a vast range of middle-income beneficiaries in order to sell the Social Security Act in the 1930s illustrates the same principle.<sup>142</sup> In the First Amendment context, the more speech that falls within a theory's privileged category of political speech, the broader the theory's appeal.

The most important example of this approach in the public rights tradition is Meiklejohn's treatment of artistic expression. Art appears to lie outside the range of Meiklejohn's First Amendment; at a minimum, his disdain for entertainment me-

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closest thing to an existing constitutional model for the extension of substantive due process that this Article advocates.

141. See, e.g., KENNETH S. BAER, REINVENTING DEMOCRATS 120–21 (2000) (describing the Democratic Party's attempt to maintain an ideologically wide range of elected officials as a "Big Tent" approach). For a brief account of major political parties' tendency to moderate policy positions by building broad-based coalitions, see Magarian, *Public Rights*, *supra* note 2, at 1961–62.

142. See DANIEL NELSON, UNEMPLOYMENT INSURANCE 205 (1969) (explaining that securing political approval of the Social Security Act required ensuring that the Act would benefit a broad group of constituencies).

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dia suggests a refusal to attribute political value to artistic expression.<sup>143</sup> However, in a later elaboration of his theory, Meiklejohn acknowledges that a “vast array of idea and fact, of science and fiction, of poetry and prose, of belief and doubt, of appreciation and purpose, of information and argument” legitimately contributes to citizens’ decisions about matters of public policy and thus warrants First Amendment protection.<sup>144</sup> Struggles with the conceptual limits of the public rights theory’s coverage can generate important, constructive refinements. Much artistic expression reflects political convictions and/or informs political debate, and further examination of the boundaries between political and nonpolitical speech will yield comparably sound insights about the political essence of other nominally nonpolitical expression.<sup>145</sup>

As a strategy for making the public rights theory more palatable, however, expanding the category of political speech contains a fatal flaw. To whatever extent we broaden the class of protected speech, we simultaneously weaken the categorical methodology that defines the public rights theory. As Meiklejohn emphasizes, the First Amendment “remains forever confused and unintelligible unless we draw sharply and clearly the line which separates the public welfare of the community from the private goods of any individual citizen or group of citizens.”<sup>146</sup> If we really believe, and can explain persuasively, that a given type of expression has political character, then admitting that expression to the scope of First Amendment protection genuinely serves the interest in ensuring robust political debate. But we cannot reasonably hope that the categorical boundary of political expression extends to, or past, the point necessary to allay a critical mass of concerns about the theory’s costs. Comprehensively reconciling the theory’s scope with autonomy values by expanding the category of protected expression would inevitably require either conceptual gerrymandering or elision of any categorical boundary. Such compromise would fatally undermine the goal of deep protection for political

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143. See MEIKLEJOHN, *supra* note 14, at 79–80 (discussing private speech generally). This disdain appears especially vivid in Meiklejohn’s savage attack on commercial radio. See *id.* at 86–88.

144. *Id.* at 117.

145. See *supra* notes 118–27 and accompanying text (discussing the value of the ongoing dispute about the boundaries of politics).

146. MEIKLEJOHN, *supra* note 14, at 79–80.



speech, increasing pressure toward retaining a balancing approach that reduces political expression to the same stature as speech less integral to a healthy democracy.

## 2. Finding Alternative Constitutional Protection for Nonpolitical Speech

The failure of attempts to improve the public rights theory by expanding the category of political expression demonstrates that any effort to cure the theory's coverage deficit must maintain a conceptual distinction between political and nonpolitical speech. The surest way to protect different categories of expression while keeping them separate is to assign different constitutional statuses to the respective categories. Leading public rights theorists, not surprisingly, have tried to do exactly that. Their ingenious efforts, while ultimately unsuccessful, provide a template for a more effective solution.

Meiklejohn's initial statement of the public rights theory appears to acknowledge the strategic risk of leaving substantial categories of speech unprotected. Even as he advocates limiting the scope of First Amendment protection to political speech and denigrates the importance of what he calls "private" speech, Meiklejohn offers an olive branch. Nonpolitical, "private" speech, while not entitled to the ironclad protection of the First Amendment, should still get constitutional protection as an aspect of the "liberty" secured by the procedural due process principles of the Fifth and Fourteenth Amendments.<sup>147</sup> In other words, the government should enjoy discretion to restrict or punish nonpolitical speech, but not without offering notice and the possibility of a hearing. This approach, Meiklejohn argues, properly treats nonpolitical speech like ordinary conduct, reflecting the insight that the First Amendment elevates political speech to a special position.<sup>148</sup> From a contemporary, strategic perspective, however, Meiklejohn's treatment of nonpolitical speech amounts to dooming with faint protection. No one who disdains the public rights theory for its failure to protect a substantial amount of nonpolitical speech will warm to the theory upon assurance that the censor's iron fist comes sheathed in a procedural velvet glove.

Sunstein's version of alternative constitutional protection for nonpolitical speech appears, upon first glance, far more

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147. *See id.*

148. *See id.* at 80.

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promising. In one of two alternative proposals for revising free speech doctrine, he advocates a “two-tiered” First Amendment.<sup>149</sup> Under this approach, the First Amendment would fully protect political speech; on the other hand, nonpolitical speech would get weaker First Amendment protection that would yield more readily to countervailing government interests.<sup>150</sup> Sunstein justifies this approach by maintaining that the Court already accords special protection to political speech while denying or limiting First Amendment protection as to several categories of nonpolitical expression: obscenity, commercial speech, and libel of private persons.<sup>151</sup> Moreover, he notes, the Court treats numerous other instances of nonpolitical speech—conspiracies, purely verbal workplace harassment, bribery, and threats—as if they are not speech at all for First Amendment purposes.<sup>152</sup> Given these existing doctrines, Sunstein argues, an explicit shift to a two-tiered First Amendment would merely ratify our active intuitions about the need to treat different categories of speech differently.

Although Sunstein appears to offer greater assurances to skeptics of the public rights theory who fear for the safety of nonpolitical speech, those assurances ultimately lack substance. First, nothing in the text, structure, or history of the Constitution provides a basis for bifurcating the First Amendment. Unlike Meiklejohn’s elaboration of the public rights theory, which anticipates and addresses originalist and textualist critiques,<sup>153</sup> Sunstein’s two-tiered First Amendment is nothing more than a convenient invention. In relying on the claim that the Court has already moved toward a two-tiered First Amendment, Sunstein makes the mistake of building a doctrine

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149. See Sunstein, *supra* note 15, at 301–15 (arguing for “primacy of politics” in First Amendment theory). Sunstein’s alternative proposal, which he calls “a New Deal for speech,” emphasizes the politically determined nature of expressive opportunities and advocates government regulation to improve the flow of ideas. See *id.* at 263–300. The public rights theory of expressive freedom contains elements in common with each of Sunstein’s approaches. See *supra* notes 14–27 and accompanying text (describing the public rights theory).

150. See Sunstein, *supra* note 15, at 306 (arguing that “government should be under a special burden of justification when it seeks to control speech intended and received as a contribution to public deliberation”).

151. See *id.* at 302.

152. See *id.*

153. See Magarian, *Public Rights*, *supra* note 2, at 1972 (describing the textual genesis of Meiklejohn’s First Amendment theory as the paradox of the First Amendment’s absolutist language but necessarily limited effect).

on disparate rules that he concedes lack a “clear principle.”<sup>154</sup> In addition, the argument from existing practice contradicts Sunstein’s own normative precept for advocating change in First Amendment theory: that the Court is insufficiently protecting political speech while overprotecting less deserving categories of expression.<sup>155</sup> Second, and accordingly, the substance of Sunstein’s two-tiered First Amendment derives from nothing more than his own normative priorities: the objection to giving such unworthies as stock prospectuses, pornography, 1-900 numbers, large political expenditures, and network television programs First Amendment pride of place.<sup>156</sup> Sunstein’s bifurcation of the First Amendment creates a structural facade for his subjective preferences.

Beyond these problems, Meiklejohn’s and Sunstein’s attempts to relocate protection for nonpolitical speech share a final, essential flaw. Neither approach addresses the basic source of discomfort with the public rights theory: that the Constitution should protect nonpolitical speech as a matter of right because people should be entitled to speak as their autonomous choices dictate.<sup>157</sup> This flaw follows naturally from each theorist’s open rejection of autonomy as a justification for protecting speech. Meiklejohn sharply criticizes “an American Individualism whose excesses have weakened and riddled our understanding of the meaning of intellectual freedom.”<sup>158</sup> Accordingly, his procedural due process approach manifestly treats nonpolitical speech like ordinary, unprivileged behavior and merely acknowledges the procedural limits the Constitution places on every government regulation. Sunstein maintains that “an approach rooted in the norm of autonomy makes it difficult to understand what is special about speech.”<sup>159</sup> Accordingly, although he formally treats nonpolitical speech as a matter of right, he too fails to offer any affirmative explanation why nonpolitical speech deserves constitutional protection. Both Meiklejohn and Sunstein rhetorically diminish speech

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154. Sunstein, *supra* note 15, at 302.

155. *See id.* at 258 (contrasting early First Amendment decisions that protected political dissenters’ rights with contemporary decisions that protect the rights of various private and corporate interests).

156. *See id.*

157. *See supra* Part I.B.2.

158. MEIKLEJOHN, *supra* note 14, at 72.

159. Sunstein, *supra* note 15, at 304.

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whose primary value goes to personal autonomy, treating such speech as a second-class constitutional citizen that can only try to squeeze under the edge of the protective umbrella that shields political speech.

These defects in previous attempts to locate alternative constitutional protection for nonpolitical speech appear inevitable because, until recently, nothing in constitutional doctrine suggested any affirmative basis for meaningfully protecting nonpolitical expression without resort to a private rights account of the First Amendment. In 2003, however, the Supreme Court provided an opening for a robust alternative source of constitutional protection for nonpolitical expression: substantive due process. Understanding how substantive due process doctrine can accommodate nonpolitical speech protection requires an examination of how the Supreme Court's most recent statement on substantive due process departs from previous law.

## II. THE SUBSTANTIVE DUE PROCESS SOLUTION TO THE NONPOLITICAL SPEECH PROBLEM

The substantive element of the Fifth<sup>160</sup> and Fourteenth Amendments' Due Process Clauses<sup>161</sup> has provided the most important constitutional opportunity for the Supreme Court to adjust the uneasy balance between majoritarian preferences, as expressed in legislative choices, and deeply rooted minority interests.<sup>162</sup> Although substantive due process doctrine lacks a straightforward foundation in the constitutional text, its resilience over time testifies to our legal system's deeply rooted in-

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160. U.S. CONST. amend. V.

161. U.S. CONST. amend. XIV, § 1, cl. 3. Substantive due process doctrine has developed primarily under the Fourteenth Amendment, which by its terms applies only to the states. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 166 (1973) (striking down a state's restrictions on abortion under the Fourteenth Amendment's Due Process Clause). The Supreme Court has extended substantive due process principles to the federal government through the Fifth Amendment's Due Process Clause. *See, e.g.*, *Reno v. Flores*, 507 U.S. 292, 301–02 (1993) (noting the availability of a substantive due process claim under the Fifth Amendment).

162. The substantive due process doctrine has generated an enormous body of scholarship. For a useful recent discussion and taxonomy, see Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 841–49 (2003) (emphasizing distinctions among the strands of substantive due process doctrine).

sight that a constitutional culture of individual rights must accommodate substantive protections of essential human activities. Even as the doctrine has taken root, however, the Supreme Court has made clear that the potentially sweeping character and necessarily uncertain judicial explication of substantive due process<sup>163</sup> require judges to balance the importance for individuals of protected conduct against significant government grounds for regulating that conduct.<sup>164</sup> Thus, the twin challenges of substantive due process jurisprudence have been to articulate a theoretical basis for unenumerated substantive rights and to identify the nature of government interests that can properly trump those rights.

The Court's most recent substantive due process decision, *Lawrence v. Texas*,<sup>165</sup> takes up both of those challenges, providing important guidelines for the further development of substantive due process. *Lawrence* earned its landmark status by striking down all state restrictions on "sodomy" between consenting adults as violations of substantive due process.<sup>166</sup> The Court held that the Constitution precluded state efforts "to define the meaning of [a personal] relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."<sup>167</sup> Two pillars of the *Lawrence* majority's reasoning portend sweeping changes beyond the scope of sodomy

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163. The great cautionary tale of substantive due process, of course, is the Court's wholesale usurpation of the elected branches' regulatory prerogatives through the economic substantive due process doctrine of the *Lochner* era. Compare *Lochner v. New York*, 198 U.S. 45, 64 (1905) (asserting broad judicial power to protect a laissez-faire right to contract against government regulation), with *Nebbia v. New York*, 291 U.S. 502, 538–39 (1934) (essentially disavowing the *Lochner* doctrine as improperly invasive of majoritarian prerogatives).

164. The Court initially implemented this balance, in cases of "fundamental rights," through strict scrutiny. See *Roe*, 410 U.S. at 155–56 (subjecting state restrictions on access to abortion to strict scrutiny). More recently in the abortion context, the Court has adjusted the balance in the government's favor by replacing strict scrutiny with an inquiry into whether the challenged government action places an "undue burden" on the abortion right. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (plurality opinion) (replacing strict scrutiny with an undue burden standard). To date, the Court has not applied the undue burden standard in any other substantive due process context.

165. 539 U.S. 558 (2003).

166. See *id.* at 578–79.

167. *Id.* at 567.

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laws or even regulations of sexual behavior generally. First, as to the basis of substantive due process rights, the Court articulated an expansive theory of personal autonomy as the essential value that substantive due process safeguards.<sup>168</sup> Second, as to the nature of superseding government interests, the Court discredited government restrictions on protected conduct that derive from purely moral justifications unrelated to potential harms to unwilling third parties.<sup>169</sup>

These two principles of *Lawrence* have great salience for a problem that no one has previously associated with substantive due process: the Constitution's protection of nonpolitical speech.<sup>170</sup> *Lawrence* affords the Court an opportunity to transplant constitutional speech protection directed at preserving personal autonomy, rather than collective political decision making, from the First Amendment to the Due Process Clause. Such a shift would satisfy our deep convictions about the importance of preserving a constitutional safeguard for all expression that advances personal autonomy. It would also create a more coherent basis for assessing the social trade-offs at stake in government regulation of nonpolitical speech. At the same time, it would enable the Court, consistent with the public rights theory, to preserve the First Amendment's Free Speech Clause as a virtually absolute shield against regulations that undermine politically salient expression.

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168. See *infra* Part II.A.1.

169. See *infra* Part II.A.2.

170. Other accounts of *Lawrence* have noted in passing that the Court's sense of substantive due process resonates with First Amendment rhetoric. See Wilson Huhn, *The Jurisprudential Revolution: Unlocking Human Potential in Grutter and Lawrence*, 12 WM. & MARY BILL RTS. J. 65, 78 (2003) (suggesting that *Lawrence* makes substantive due process more like First Amendment speech protection by transforming it into "a subjective, abstract principle"); Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1107 (2004) (describing "associational freedom" as a predicate for "identity formation" within the realm of substantive due process); Tribe, *supra* note 124, at 1932 (noting the similarity between *Lawrence's* analysis and the First Amendment's prohibition on certain grounds for government regulation). In addition, of course, the Due Process Clause has long protected a great deal of speech through its incorporation of the First Amendment's protections. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding that "freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States"); Rubin, *supra* note 162, at 842 (discussing incorporation as a species of substantive due process doctrine).

A. *LAWRENCE V. TEXAS* AND THE NEW DAWN OF SUBSTANTIVE DUE PROCESS PROTECTION

Prior to *Lawrence*, the Supreme Court's enthusiasm for protecting substantive rights under the Due Process Clause appeared marginal at best. Substantive due process doctrine had reached its recent high water marks in the Court's tepid reaffirmation of the right to abortion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>171</sup> and indications from a splintered majority of Justices in *Washington v. Glucksberg* that the Due Process Clause might, in extreme circumstances, support a right to physician-assisted suicide.<sup>172</sup> But the Court had declined invitations to extend the substantive due process principle to new rights after *Roe v. Wade*,<sup>173</sup> harshly rejecting claims for due process rights to parental visitation in *Michael H. v. Gerald D.*,<sup>174</sup> to sexual autonomy in *Bowers v. Hardwick*,<sup>175</sup> and to a right to die with dignity in *Glucksberg*.<sup>176</sup>

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171. 505 U.S. 833 (1992); *see also* *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986) (striking down provisions of a state's abortion law because "they wholly subordinate constitutional privacy interests and concerns with maternal health in an effort to deter a woman from making a decision that, with her physician, is hers to make"), *overruled in part by Casey*, 505 U.S. at 870, 882–83.

172. *See* 521 U.S. 702, 736 (1997) (O'Connor, J., concurring) (leaving open the question of "whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death"); *id.* at 738 (Stevens, J., concurring in the judgments) (finding "room for further debate about the limits that the Constitution places on the power of the States to punish" physician-assisted suicide); *id.* at 782 (Souter, J., concurring in the judgments) (stating that "the importance of the individual interest here, as within that class of 'certain interests' demanding careful scrutiny of the State's contrary claim cannot be gainsaid" but reserving judgment on the question "[w]hether that interest might in some circumstances, or at some time, be seen as 'fundamental' to the degree entitled to prevail") (citation omitted). Justices Breyer and Ginsburg joined Justice O'Connor's concurrence in substance. *See id.* at 736; *see also* *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 287 (1990) (upholding a state court decision that required a family's discontinuation of a daughter's life-sustaining treatment to be supported by clear and convincing evidence of her wishes).

173. 410 U.S. 113, 153 (1973) (recognizing women's reproductive freedom as part of the privacy rights inherent in due process).

174. 491 U.S. 110, 124–27 (1989) (rejecting a biological father's claimed right to visit his child, who was in the custody of the child's biological mother and adoptive father).

175. 478 U.S. 186, 191 (1986) (rejecting the argument that the Due Process Clause conferred a fundamental right to engage in consensual gay sex), *overruled by Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

176. 521 U.S. at 728.

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*Lawrence* dramatically shifted the tide, reinvigorating substantive due process both by sharpening the doctrine's affirmative rationale and by tightening the restrictions it imposes on government regulation.

1. Substantive Due Process as a Guarantor of Personal Autonomy

First, Justice Kennedy's *Lawrence* opinion makes the Court's strongest statement to date on the roots of substantive due process doctrine in the personal right to live and behave autonomously.<sup>177</sup> The idea that substantive due process protects individuals' right to make autonomous decisions about matters central to their lives and identities is hardly novel. Beginning with *Griswold v. Connecticut*, the Court rooted modern, noneconomic substantive due process in personal privacy,<sup>178</sup> a concept closely related to autonomy. *Griswold* linked substantive due process protection to the marital relationship,<sup>179</sup> but Justice Brennan, in *Eisenstadt v. Baird*,<sup>180</sup> moved toward an individualized notion of personal autonomy. "If the right of privacy means anything," he wrote for the Court, "it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affect-

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177. The *Lawrence* Court's concept of individual autonomy integrates strong concerns with both relative equality of treatment and interactions among different people and groups. See Hunter, *supra* note 170, at 1134 (arguing that *Lawrence* reflects "an appreciation of the mutual reinforcement of equality and liberty principles"); David D. Meyer, *Domesticating Lawrence*, 2004 U. CHI. LEGAL F. 453, 480–85 (casting *Lawrence* as a "family privacy" decision); Schacter, *supra* note 124, at 749–51 (suggesting that *Lawrence* combines notions of liberty and equality with special emphasis on interpersonal relationships); Tribe, *supra* note 124, at 1898 (arguing that *Lawrence* "both presupposed and advanced an explicitly equality-based and relationally-situated theory of substantive liberty").

178. See 381 U.S. 479, 485 (1965) ("The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.").

179. See *id.* at 485–86 (basing the Court's decision to strike down a state contraceptive ban on "notions of privacy surrounding the marriage relationship"). In emphasizing the family relationship, the *Griswold* Court followed the pattern of two cases from the 1920s, often cited as precursors of noneconomic substantive due process, in which the Court struck down restrictions on parents' decisions about how to educate their children. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

180. 405 U.S. 438 (1972).



ing a person as the decision whether to bear or beget a child.”<sup>181</sup> The seeds of personal autonomy in *Eisenstadt* bore doctrinal fruit when the Court, in *Roe v. Wade*, affirmed women’s due process right to receive abortions.<sup>182</sup> The *Roe* Court appeared to embrace the idea that the Due Process Clause protected people’s right to make intimately personal decisions without government interference.<sup>183</sup>

*Eisenstadt*, however, came to represent a road not taken. Beginning with its emphatic approval in *Bowers v. Hardwick* of state prohibitions on sodomy, the Court appeared to abandon the idea that substantive due process embodies broad constitutional protection for personal autonomy.<sup>184</sup> The key substantive due process decisions that followed *Bowers* neither recanted its restrictive reasoning nor offered much hope that the Court would restore a robust concept of personal autonomy to the center of due process jurisprudence. In *Michael H. v. Gerald D.*, Justice Scalia’s opinion upholding a state presumption of legitimacy for children born in wedlock disdained any broad notion of liberty in favor of deference to traditions of state law.<sup>185</sup> Although the declaration of the plurality in *Planned Parenthood of Southeastern Pennsylvania v. Casey* that “the heart of liberty” harbored “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”<sup>186</sup> anticipated *Lawrence* rhetorically, the rhetoric rang hollow as the *Casey* plurality permitted states to restrict abortion

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181. *Id.* at 453.

182. 410 U.S. 113, 164–67 (1973).

183. *See id.* at 152–53; *see also* *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684–86, 699 (1977) (plurality opinion) (invoking the Due Process Clause to strike down a state statute that banned the sale of contraceptives to minors).

184. 478 U.S. 186, 191 (1986) (complaining that “despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content” and declaring that many of the Court’s noneconomic substantive due process decisions “have little or no textual support in the constitutional language”), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

185. *See* 491 U.S. 110, 127 (1989) (“What counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child. We are not aware of a single case, old or new, that has done so. This is not the stuff of which fundamental rights qualifying as liberty interests are made.”).

186. 505 U.S. 833, 851 (1992).

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rights through enforced waiting periods accompanied by mandatory information designed to discourage abortions<sup>187</sup> and parental consent schemes for minors who sought abortions.<sup>188</sup> Chief Justice Rehnquist's opinion for the Court in *Washington v. Glucksberg* came close to disdaining substantive due process altogether, emphasizing the supposed analytic perils of extending the doctrine and reiterating the *Michael H.* conception of tradition-bound due process jurisprudence.<sup>189</sup>

*Lawrence* revitalizes the *Eisenstadt* idea of personal autonomy and makes it the basis of a momentous decision that boldly overrules *Bowers* and enshrines in constitutional law the sexual freedom of gay men and lesbians. Justice Kennedy begins his *Lawrence* analysis by defining liberty, the central value in substantive due process doctrine,<sup>190</sup> in terms of autonomy: "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."<sup>191</sup> The majority rejects the proposition that substantive due process protection requires a specific basis in tradition.<sup>192</sup> In apprehending the issue before the Court, Justice Kennedy rebukes the view of *Bowers* that sodomy laws merely implicate "the right to engage in certain sexual conduct."<sup>193</sup> That formulation of the question, Justice Kennedy insists, trivializes the interest of people subject to liability for violating sodomy prohibitions.<sup>194</sup> He posits a much broader interest at stake in substantive due process challenges to state restrictions on intimate behavior: "the autonomy of the person" in making "personal decisions relating to marriage, procreation, contraception, fam-

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187. *See id.* at 882 (upholding against due process challenge Pennsylvania's "informed consent" requirement for abortions).

188. *See id.* at 899 (upholding against due process challenge Pennsylvania's parental consent requirement for minors who seek abortions).

189. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) ("We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.") (internal quotation marks and citation omitted).

190. *See Hunter*, *supra* note 170, at 1106–07 (suggesting that *Lawrence* replaces privacy with liberty as the principle behind substantive due process).

191. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

192. *See id.* at 571. The majority leaves dissenting Justice Scalia to wave the faded flag of his tradition-specific approach. *See id.* at 592–93 (Scalia, J., dissenting).

193. *Id.* at 567 (majority opinion).

194. *See id.*

ily relationships, child rearing, and education.”<sup>195</sup> A restriction on the sexual practices of consenting adults represents an effort by the state to “demean their existence [and] control their destiny.”<sup>196</sup> For the *Lawrence* Court, substantive due process protects not a mere descriptive activity but rather a normative value—that of personal autonomy.

## 2. The Inadequacy of Purely Moral Justifications for Limits on Personal Autonomy

A second defining feature of *Lawrence* is the Court’s willingness to embrace a logical implication of noneconomic substantive due process doctrine that it previously avoided: government may not restrict or punish personal decisions based purely on moral disapproval.<sup>197</sup> The Court’s rejection of the essentially moral regulations in *Griswold*,<sup>198</sup> *Eisenstadt*,<sup>199</sup> and *Roe*<sup>200</sup> appeared to reflect an understanding that a state’s imposing its moral judgments on individuals’ intimate personal decisions effectively negates personal autonomy. Subsequent decisions, however, gave substantial deference to states’ purely moral grounds for limiting personal autonomy. The *Bowers* Court insisted that “the law . . . is constantly based on notions

195. *Id.* at 574.

196. *Id.* at 578.

197. Commentators have noted this feature of *Lawrence*. See Huhn, *supra* note 170, at 90–92; Hunter, *supra* note 170, at 1112; Schacter, *supra* note 124, at 740. But see Andrew Koppelman, *Lawrence’s Penumbra*, 88 MINN. L. REV. 1171, 1175–76 (2004) (arguing that the *Lawrence* Court simply found the state’s moral interest insufficient to outweigh the liberty interest at stake). Professor Tribe argues that the rejection of moral regulation in *Lawrence* extends only to regulations that burden associational rights. See Tribe, *supra* note 124, at 1935–36. The basis and scope of that asserted limit, however, remain unclear. Another potential limit on the decision’s rejection of moral regulation stems from the fact that the sodomy statutes at issue in *Lawrence* carried criminal penalties. Nothing in the opinion, however, limits the Court’s reasoning to criminal regulations, and *Lawrence* seems highly salient for non-criminal regulations that seriously burden personal autonomy.

198. See *Griswold v. Connecticut*, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring) (“[I]t is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly . . .”).

199. See *Eisenstadt v. Baird*, 405 U.S. 438, 448 (1972) (rejecting “deterrence of premarital sex” as a reasonable justification for a law that banned giving contraceptives to unmarried persons).

200. See *Roe v. Wade*, 410 U.S. 113, 162 (1973) (“[W]e do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.”).

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of morality” and practically ridiculed the notion of due process scrutiny for “all laws representing essentially moral choices.”<sup>201</sup> The *Casey* plurality predicated its revision of the *Roe* abortion right on heightened solicitude for the government’s interest in “protection of potential life.”<sup>202</sup> In particular, the plurality compromised its emphasis on pregnant women’s decisional autonomy in deference to “the spouse, family, and society which must confront the knowledge that [abortion] procedures exist, procedures some deem nothing short of an act of violence against innocent human life.”<sup>203</sup> Although the plurality included this interest among “consequences” of abortion,<sup>204</sup> it made no effort to explain how purely moral disapproval of the procedure could carry anything more than a purely moral consequence. Likewise, the *Glucksberg* Court counted among the “important and legitimate” government interests that justified state bans on physician-assisted suicide the “symbolic and aspirational as well as practical” desire to preserve human life.<sup>205</sup>

*Lawrence* reverses the tendency to approve purely moral regulations by adopting perhaps the farthest-reaching language from Justice Stevens’s dissenting opinion in *Bowers*: “[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”<sup>206</sup> Justice Kennedy underscores the rejection of purely moral regulation in his justification for overruling *Bowers*. Contrasting that departure from stare decisis with the Court’s adherence to precedent in *Casey*,<sup>207</sup> he explains that “there has been no individual

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201. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by Lawrence*, 539 U.S. at 578.

202. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992). Of course, the question whether the government’s interest in protecting potential life implicates harm to a third party defines the philosophical frontiers of the abortion debate. However, a Court committed to prohibiting purely moral regulation would have needed, at a minimum, to acknowledge its inability to resolve that question.

203. *Id.* at 852.

204. *Id.*

205. *See Washington v. Glucksberg*, 521 U.S. 702, 728–29 (1997) (plurality opinion) (describing the state’s “unqualified interest in the preservation of human life” (quoting *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 282 (1990))); *see also id.* at 746 (Stevens, J., concurring) (recognizing the government interest in the “sanctity of life”).

206. *Lawrence*, 539 U.S. at 577 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

207. *See Casey*, 505 U.S. at 860–61 (explaining the importance of adhering

or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so.”<sup>208</sup> However, as Justice Scalia correctly points out in dissent, many people relied extensively on *Bowers* if one treats “a governing majority’s belief that certain sexual behavior is ‘immoral and unacceptable’” as a cognizable basis for a reliance interest.<sup>209</sup> Justice Kennedy also contrasts the consensual activity that sodomy prohibitions restrict with conduct that involves “minors” or “persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused” and with “public conduct or prostitution.”<sup>210</sup> Those distinctions imply that the state legitimately may restrict personal autonomy only where the autonomous decision or conduct at issue harm third parties or the public.<sup>211</sup> Justice Scalia casts the majority’s distinctions into even sharper relief by insisting that *Lawrence* undermines all state prohibitions of “bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity” because such prohibitions are “sustainable only in light of *Bowers*’ validation of laws based on moral choices.”<sup>212</sup>

The *Lawrence* majority’s rejection of purely moral justifications for state restrictions on important decisions situates the Court in a long and distinguished line of critics of moral regulation. In John Stuart Mill’s famous formulation, “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent

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to precedent in the abortion context).

208. *Lawrence*, 539 U.S. at 577.

209. *Id.* at 589 (Scalia, J., dissenting) (quoting *Bowers*, 478 U.S. at 196).

210. *Id.* at 578 (majority opinion).

211. Justice O’Connor’s opinion concurring in the judgment in *Lawrence*, which relies on the narrower ground of the Equal Protection Clause, echoes the majority’s criticism of purely moral regulation in the context of legal distinctions among groups of people. For Justice O’Connor, “[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be ‘drawn for the purpose of disadvantaging the group burdened by the law.’” *Id.* at 583 (O’Connor, J., concurring in the judgment) (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

212. *Id.* at 590 (Scalia, J., dissenting); see also *id.* at 599 (repeating the charge). Wilson Huhn makes the interesting observation that Justice Scalia and the Court display clashing visions of morality, with Justice Scalia insisting on mandatory rules where the majority views decisional autonomy as a predicate for morally viable personal choices. See Huhn, *supra* note 170, at 91–93.

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harm to others.”<sup>213</sup> This “harm principle” is a familiar, and much debated, idea in liberal democratic theory.<sup>214</sup> In the substantive due process context, the principle mandates that only the potential for harm to unwilling third parties can justify restraints on intimate personal decisions.<sup>215</sup> Justice Kennedy in *Lawrence* holds that due process bars “attempts by the State, or a court, to define the meaning of [a personal] relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.”<sup>216</sup> Acknowledging the moral basis for the *Bowers* decision, he specifically rejects the idea that “the majority may use the power of the State to enforce [moral] views on the whole society through operation of the criminal law.”<sup>217</sup> This understanding departs dramatically not only from *Bowers* but also from *Casey* and *Glucksberg*.<sup>218</sup> The *Lawrence* majority’s embrace of the harm principle follows naturally from its positive emphasis on personal autonomy. If the Constitution protects people’s prerogatives to live their lives as they see fit, then government interference with an individual’s decisions about matters central to personal autonomy can only be just if necessary to protect some other person’s concrete interest.

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213. JOHN STUART MILL, *ON LIBERTY* 9 (Alburey Castell ed., Appleton-Century-Crofts, Inc. 1947) (1859).

214. The classic exchange in the past half-century about the legitimacy of purely moral justifications for constraints on autonomy is the Hart-Devlin debate. Compare H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963) (advocating the harm principle), with PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1975) (defending morality-based regulation).

215. David Meyer argues that reading *Lawrence* as having embraced the harm principle threatens to undermine the ways in which moral conceptions of family relationships have contributed to socially beneficial family relationships. See Meyer, *supra* note 177, at 477. Although Meyer identifies values worth protecting, his concern rests on an unduly positive presumption about the effects of majoritarian morality on human flourishing; overestimates the ability of substantive due process doctrine to constrain affirmative government initiatives designed to accomplish social policy goals, such as spending programs and public information campaigns; and underestimates the scope of legally cognizable harm under the harm principle.

216. *Lawrence*, 539 U.S. at 567. Justice Kennedy notes that “19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals.” *Id.* at 569. In contrast, “[t]he present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution.” *Id.* at 578.

217. *Id.* at 571.

218. See *supra* notes 201–05 and accompanying text.

## B. SUBSTANTIVE DUE PROCESS AND NONPOLITICAL SPEECH

The Court's reasoning in *Lawrence* enables a fundamental revision of constitutional free speech doctrine. The *Lawrence* account of substantive due process does not merely echo the private rights theory's call to protect speech in the name of personal autonomy;<sup>219</sup> rather, *Lawrence* gives that imperative a more comfortable home in substantive due process than it presently enjoys in the First Amendment. The Court should take this opportunity to shift the basis for constitutional protection of speech whose primary value goes to personal autonomy from the First Amendment to the Due Process Clause.<sup>220</sup> Under this approach, the Court in nonpolitical speech cases would balance the value of the burdened speech for some person's or persons' autonomy against the concrete harm the speech threatened to third parties. Complementing that change, the Court should limit the scope of First Amendment expressive freedom to speech whose primary value goes to political discourse.

These two doctrinal moves would bring several related benefits. Judicial analysis of nonpolitical speech regulations would gain coherence and force through explicit focus on the personal autonomy value of speech claims and the credibility of government submissions about harm from expression. Nonpolitical speech would enjoy substantial constitutional protection, with the strongest protection attaching to the speech claims that most forcefully served the societal consensus to protect personal autonomy. Meanwhile, political speech would gain the deep First Amendment protection that Meiklejohn envisioned,

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219. See *supra* notes 2–6 (discussing the private rights theory's emphasis on personal autonomy as a basis for constitutional protection of speech).

220. One practical concern about this shift is that the Court only recently decided *Lawrence*, and nonpolitical speech protection is too important to be predicated on a freshly minted precedent in a volatile area of law. Following this Article's prescription, however, should diminish the likelihood that a later Court would undermine *Lawrence*, both because my proposal would expand the practical scope of substantive due process and because the proposal rests on an account of *Lawrence* that should firmly ground the decision as precedent. Even if the Court did adopt my proposal and then, at some later time, weaken or abandon *Lawrence*, it presumably would restore nonpolitical speech protection to the First Amendment, because such a retrenchment would represent, among other things, a rejection of this Article's case for treating nonpolitical speech as a matter of substantive due process rather than a First Amendment concern. In addition, as I discuss *infra* Part III, present First Amendment protection for nonpolitical speech is hardly so ironclad or firmly grounded as to render my proposal inordinately risky by comparison.

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free from the balancing against government regulatory interests appropriate for speech claims less salient to our Constitution's central democratic aspirations.<sup>221</sup>

The two key features of the *Lawrence* opinion discussed in the previous section—emphasis on personal autonomy as the driving force behind substantive due process and rejection of purely moral regulation in favor of the harm principle—make the Due Process Clause a viable source of constitutional protection for nonpolitical speech.

First, the *Lawrence* Court's emphasis on personal autonomy's centrality to constitutional rights resonates strongly with the private rights theory of expressive freedom and thus with much contemporary free speech doctrine. Under the private rights theory, the Constitution ensures expressive freedom because expression is an essential vehicle through which individuals advance their interests, and government interference with expression accordingly cuts to the heart of personal autonomy. Substantive due process, as conceptualized in *Lawrence*, deepens and elaborates on that understanding, expanding it to encompass all manner of self-actualizing behavior. Moreover, the idea of autonomy revived and strengthened in *Lawrence* reflects particular concern with personal freedom to conduct intimate interpersonal relationships, a concern that parallels the necessary emphasis of speech protection on communication and association between and among people.<sup>222</sup>

Prior to *Lawrence*, the Court's tentative, contingent linkage of personal autonomy with substantive due process was too weak to provide a bridge between due process and free speech doctrines.<sup>223</sup> In contrast, the *Lawrence* Court's account of personal autonomy's centrality to substantive due process echoes and sharpens the reasoning of decisions that protect expression because of its autonomy value. Just as *Lawrence* emphasizes "an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,"<sup>224</sup> the Court's free speech jurisprudence emphasizes the contribution speech

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221. See *supra* notes 15–18 and accompanying text (discussing the public rights theory's advocacy of categorical protection, rather than balancing, for political speech).

222. See Tribe, *supra* note 124, at 1939–40 (identifying "speech and the peaceful commingling of separate selves [as] facets of the eternal quest for . . . exchanging emotions, values, and ideas").

223. See *supra* notes 184–89 and accompanying text.

224. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).



makes to personal autonomy.<sup>225</sup> Justice Kennedy's libertarian rhetoric in *Lawrence* echoes his First Amendment opinions, which strongly reflect the private rights theory of expressive freedom.<sup>226</sup> Justice Kennedy has even noted affinities between substantive due process and the autonomy concerns that undergird the private rights theory of expressive freedom, suggesting that early twentieth-century due process decisions that protect parents' decisions about child-rearing, "had they been decided in recent times, may well have been grounded upon First Amendment principles."<sup>227</sup>

Second, the *Lawrence* Court's embrace of the harm principle closely parallels free speech doctrine's emphasis on the impermissibility of regulation. Disdain for purely moral regulation features prominently in First Amendment doctrine, generating free speech law's core directive against regulations of expression that reflect the government's normative disapproval of the speaker's ideas.<sup>228</sup> Judges and scholars who disagree about other elements of First Amendment theory generally agree that the worst affront to expressive freedom is regulation that censors or punishes a particular viewpoint.<sup>229</sup> The Supreme Court's rejection of viewpoint-based regulation even within the boundaries of speech unprotected by the First

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225. See *supra* notes 2–13 and accompanying text.

226. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (Kennedy, J.) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.").

227. *Troxel v. Granville*, 530 U.S. 57, 95 (2000) (discussing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (plurality opinion), and *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923)).

228. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys . . . . Viewpoint discrimination is thus an egregious form of content discrimination."); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("The general principle . . . is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."); *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

229. Compare MEIKLEJOHN, *supra* note 14, at 26 (positing as "the vital point" of free speech theory "that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another"), with Fried, *supra* note 131, at 225 ("Government may not suppress or regulate speech because it does not like its content . . . . If government regulates the time, place or manner of speech, it must regulate in a way that does not take sides between competing ideas.").

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Amendment indicates the fundamental incompatibility of constitutional speech protection with majoritarian judgments about the quality of competing ideas.<sup>230</sup> Whereas prohibiting purely moral regulation marks a bold step for regulations of sexual behavior, that prohibition already pervades the law applied to restrictions on speech and expressive conduct.

Prior to *Lawrence*, the Court's substantive due process doctrine too easily tolerated purely moral regulation, precluding a bridge between due process and free speech principles.<sup>231</sup> Invoking substantive due process as a ground for protecting expression would have permitted many government regulations of speech based on majoritarian preferences, a notion intolerable to First Amendment doctrine. But the *Lawrence* Court's account of permissible grounds for regulation, like its autonomy-based justification of due process rights, harmonizes substantive due process doctrine with familiar principles of expressive freedom.<sup>232</sup> The harm principle of *Lawrence* replicates the most substantial reason for limiting speech protection in some instances: that the speech in question will cause concrete harm.<sup>233</sup> One of the public rights theory's core principles is that

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230. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) (accepting the assumption that a municipal ordinance prohibiting the display of objects intended to arouse anger or alarm restricted only unprotected "fighting words" but nonetheless striking down the ordinance under the First Amendment). For a discussion of *R.A.V.* as an exemplar of rights doctrines' focus on preventing improperly motivated regulations, see Tribe, *supra* note 124, at 1932–33. See also Hunter, *supra* note 170, at 1115–16 (noting the *Lawrence* Court's emphasis on the legitimacy of the government's ground for regulation).

231. See *supra* notes 201–05 and accompanying text.

232. Professor Baker advances a distinctively robust autonomy-centered theory of expressive freedom, arguing that harm should not justify regulation of speech because the autonomy values he views as justifying speech protection supersede society's interest in preventing harm. See Baker, *supra* note 129, at 992. Baker's argument appears to depend on the idea that speech is a distinctive exercise of "liberty," a notion that further depends on his conception of speech as operating nonviolently and noncoercively. See *id.* at 986 (defining protected expression). Baker fails to distinguish speech from action that similarly advances liberty without resort to coercion and violence or, in the alternative, to sufficiently distinguish "harmful" effects of speech from coercive or violent effects. Thomas Scanlon parses the appropriate role of harm in speech regulation more persuasively. See Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 209–22 (1972). He distinguishes regulations that seek to prevent persuasion to do harm, which Scanlon's free speech theory presumptively would bar, from regulations that seek to prevent speech that materially assists in the commission of harmful acts, which Scanlon presumptively would allow. See *id.*

233. The harm principle stands behind most of the Supreme Court's exclu-

fear of harm has no salience in political speech cases, except in circumstances where the speech at issue threatens to render debate itself impossible.<sup>234</sup> *Lawrence* allows that principle to stand under the First Amendment while providing a sensible guideline for balancing in nonpolitical speech cases.

Enlisting substantive due process to protect nonpolitical speech would improve upon present free speech doctrine by employing a different, more theoretically coherent constitutional principle to trigger searching judicial review of burdens on speech that primarily advances personal autonomy rather than political discourse. Under present First Amendment doctrine, which encompasses political and nonpolitical speech, a court will subject a regulation to heightened scrutiny simply because the regulation targets or burdens an activity classified as expressive. In contrast, a *Lawrence*-derived substantive due process shield for nonpolitical speech would subject a regulation of such speech to searching judicial review because the speech advanced personal autonomy. This linkage does not imply that all expression is entitled to substantive due process protection, nor does it obscure the Court's established commitment to protecting various kinds of nonexpressive conduct under the Due Process Clause.<sup>235</sup> Rather, in light of *Lawrence*, the

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sions of particular categories of speech, such as incitement and true threats, from First Amendment protection. See *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (incitement to imminent lawless action); *Watts v. United States*, 394 U.S. 705, 707 (1969) (“true threats”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 268 (1964) (some defamation); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“fighting words”). The glaring exception is the obscenity doctrine. See *infra* notes 280–83 and accompanying text (contending that acceptance of the harm principle as a barometer of justifiable speech restrictions requires rejection of the Supreme Court's present basis for permitting obscenity regulations). Concerns about harm also explain Supreme Court decisions that uphold speech restrictions under a balancing analysis. See, e.g., *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657–61 (1990) (upholding a state's restriction on corporate political expenditures under strict scrutiny because the state had a compelling interest in preventing “a danger of real or apparent corruption”).

234. See *supra* notes 14–20 and accompanying text. This position compels, among other things, full protection for political statements that insult or deride specified groups of people. An aspiration of the public rights theory is that its affirmative First Amendment commitment to robust public debate would increase real opportunities to answer such hateful expression, which often targets people and groups for whom a merely formal right to respond with “more speech” rings hollow. Cf. Magarian, *Public Rights*, *supra* note 2, at 1983–85 (describing the public rights theory's substantive conception of expressive freedom).

235. See *supra* notes 178–83 and accompanying text (describing present

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Due Process Clause should protect behavior that advances personal autonomy, whether or not the behavior has the descriptive characteristics of “speech.”<sup>236</sup> As a practical matter, however, expression is a category of behavior especially likely to serve and reflect a person’s autonomy and individuality. Moreover, in classic substantive due process terms, the Free Speech Clause generates penumbras<sup>237</sup> or implications<sup>238</sup> that make expression that the First Amendment does not protect an especially logical object of substantive due process protection.

Applying *Lawrence* to nonpolitical speech claims would avoid the pitfalls of previous attempts in the public rights tradition to differentiate constitutional protections of political and nonpolitical speech.<sup>239</sup> Unlike Meiklejohn’s procedural due process salve,<sup>240</sup> substantive due process would provide meaningful protection to speech that advances personal autonomy, reflecting the insight that nonpolitical speech, to the extent it serves the interest of personal autonomy, deserves a substantially greater constitutional shield than ordinary behavior. Unlike Sunstein’s two-tiered First Amendment,<sup>241</sup> the substan-

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substantive due process protections for various nonexpressive activities).

236. By making nonpolitical speech claims turn on the importance of the speech in question for personal autonomy, this due process approach would circumvent the speech-action distinction that Robert Bork emphasized to undermine the logic of protecting nonpolitical speech under the First Amendment. See Bork, *supra* note 25, at 25 (contending that the First Amendment cannot protect merely self-gratifying speech because no principle permits a distinction between self-gratifying speech and self-gratifying action). Of course, shifting nonpolitical speech protection to the Due Process Clause would also require judges to elaborate and implement legal values, an approach that could hardly have less affinity with Bork’s jurisprudence. See *id.* at 28 (arguing that commitment to neutral principles requires leaving disputes about nonpolitical speech to “the enlightenment of society and its elected representatives”).

237. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (noting that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance”).

238. See *id.* at 500 (Harlan, J., concurring in the judgment) (presenting the issue as whether the law “infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values ‘implicit in the concept of ordered liberty’” (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937))).

239. See *supra* Part I.C.2.

240. See MEIKLEJOHN, *supra* note 14, at 79–80 (proposing protection for nonpolitical speech under procedural due process principles).

241. See Sunstein, *supra* note 15, at 263–315 (advancing a proposal to accord nonpolitical speech a lower level of First Amendment protection than political speech would receive).

tive due process approach would, thanks to *Lawrence*, enjoy a doctrinally coherent foundation and embody a principled basis for extending strong constitutional protection to important instances of nonpolitical expression. Unlike both previous proposals, the substantive due process solution would advance the positive value of the public rights theory—maximizing protection for political speech—while also effectuating the core insight of the private rights theory: that personal autonomy occupies a central place in our conception of constitutional rights.

Indeed, by concentrating constitutional analysis of nonpolitical speech claims on the personal autonomy values at stake, this substantive due process approach would far more accurately reflect the principal reason for protecting nonpolitical speech than present First Amendment doctrine does. Under my proposal, the Constitution should not protect speech, nonpolitical or political, merely because it is formally “speech,” but rather because it advances either personal autonomy or political discourse. Focusing on the reason that nonpolitical speech deserves strong constitutional protection would give the Court a firm basis for keeping that protection robust. Just as the public rights theory of expressive freedom requires emphasis on the bottom line of healthy political discourse, application of the *Lawrence* doctrine to nonpolitical speech would require emphasis on the bottom line of protecting personal autonomy.

Some may object to extending substantive due process doctrine to encompass nonpolitical speech due to the queasiness that reflexively greets any proposal to extend substantive due process. On this view, courts should avoid invoking substantive due process because the Due Process Clause provides no clear standards for judicial decision and thus invites judicial activism.<sup>242</sup> This argument rests on questionable premises—that

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242. The Court articulated this view in *Collins v. City of Harker Heights*:

As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

503 U.S. 115, 125 (1992) (citation omitted). Critics might also point out that the Supreme Court has barred substantive due process claims where a specific constitutional guarantee is available to challenge the conduct at issue. See *Graham v. Connor*, 490 U.S. 386, 394–95 (1989) (holding that excessive-force claims against police officers must be brought under the Fourth Amendment because it provides an “explicit textual source of constitutional protection”). Lower courts have invoked *Graham* to bar substantive due process claims be-

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any constitutional text provides more than a broad outline for a complex and sophisticated doctrine of rights, that personal freedom should be a stingy exception to the rule of government power, and that judicial innovation contradicts the constitutional design. Even if one accepts its premises, however, the argument cannot withstand scrutiny. First, the *Lawrence* personal autonomy principle clarifies substantive due process doctrine by providing a conceptually specific value capable of channeling judicial discretion. Second, present First Amendment doctrine already requires judges to make all manner of subjective, discretionary decisions in balancing nonpolitical (as well as political) expressive interests against government regulatory interests.<sup>243</sup> Framing nonpolitical speech claims in personal autonomy terms, far from increasing judicial subjectivity, would anchor free speech jurisprudence by injecting the defining concept of personal autonomy into the balancing of the speaker's and the government's interests.

### III. APPLYING SUBSTANTIVE DUE PROCESS TO NONPOLITICAL SPEECH

Shifting constitutional protection for nonpolitical speech from the First Amendment to the Due Process Clause would work a substantial change in the law. On the First Amendment side of the fence, political speech would enjoy stronger protection than it currently does, because no other categories of speech would complicate the public rights theory's elevation of political speech to the highest constitutional priority.<sup>244</sup> This section briefly explores the practical implications of my pro-

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cause the plaintiffs could have sued under the First Amendment. *See* Hufford v. McEnaney, 249 F.3d 1142, 1151 (9th Cir. 2001) (barring a firefighter's claim that his department fired him for reporting coworkers' misconduct); *cf.* Thaddeus-X v. Blatter, 175 F.3d 378, 387–88 (6th Cir. 1999) (en banc) (discussing the direction from *Graham* that substantive due process is an inappropriate basis for claims rooted in an enumerated constitutional right and proceeding to analyze the plaintiffs' retaliation claims under a First Amendment framework). Peter Rubin has argued persuasively that only a narrow reading of *Graham*, limited to using specific rights guarantees to define the ceilings of substantive due process claims, comports with established rights jurisprudence. *See* Rubin, *supra* note 162, at 865. In any event, my proposal would obviate the *Graham* problem for nonpolitical speech claims because those claims would no longer properly arise under the First Amendment.

243. *See supra* notes 105–11 and accompanying text (discussing the necessity of judicial line drawing under present First Amendment doctrine).

244. *See supra* notes 100–01 and accompanying text (describing the benefits for political speech of a judicial shift to the public rights theory).

posed shift for several controversies involving nonpolitical speech. Courts would allow government to regulate speech that is not substantially related to personal autonomy based on credible showings of potential harm. Speech integral to personal autonomy, however, would receive protection comparable to, and in some cases stronger than, the protection that the First Amendment presently provides.

One preliminary problem is determining whose personal autonomy should matter in the substantive due process speech balance. The subjects of the personal autonomy claim in *Lawrence* were direct participants in the legally proscribed behavior. Courts would face greater challenges in determining the locus of due process claims involving speech. First Amendment theorists frequently have acknowledged the parallel autonomy interests of speakers and people who receive information.<sup>245</sup> Given the plurality of autonomy interests in expression, courts that apply the Due Process Clause to nonpolitical speech claims could properly consider the interests of receivers as well as speakers, according due process protection both to speech that advances the speaker's autonomy interest and to speech that advances the autonomy interests of individual listeners. Notwithstanding the vagaries of standing doctrine,<sup>246</sup> the autonomy interests of receivers would provide grounds for institutional speakers to raise free speech claims under the Due Process Clause in appropriate circumstances.

The discussion that follows requires two additional caveats. First, the *Lawrence* Court left unclear its precise standard of review and the relationship of its analysis to doctrinal elements of previous substantive due process cases.<sup>247</sup> Considering

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245. See, e.g., Redish, *supra* note 104, at 620–21 (arguing that expressive freedom serves the value of individual self-realization both by protecting speech and by protecting the right to receive information).

246. See, e.g., Warth v. Seldin, 422 U.S. 490, 505 (1975) (holding that a claim that the rights of a third party have been violated is insufficient to establish standing). An approach to constitutional speech protection that emphasized the consequences of protecting or regulating expression would require reevaluation of the Court's present standing doctrine. See Magarian, *Public Rights*, *supra* note 2, at 1988–89 & n.211.

247. The indeterminate standard of review may simply reflect tiered scrutiny's limited analytic value. See Tribe, *supra* note 124, at 1916–17 (arguing that the *Lawrence* Court, despite avoiding the ordinary rhetorical formulations of tiered scrutiny, obviously subjected the Texas sodomy prohibition to a rigorous standard of review). Alternatively, the *Lawrence* Court may have viewed the prior substantive due process decisions' emphasis on identifying "fundamental rights" as a rhetorical trap inclined to limit the doctrine's pro-

how free speech controversies would play out under a *Lawrence*-derived regime therefore involves a necessary element of conjecture. Second, my proposal would not completely divide speech claims between First Amendment and substantive due process cases. Claimants who challenged government interference with their putatively nonpolitical expression would, under my proposal, retain the opportunity to contend that their burdened expression had sufficient political character to warrant First Amendment protection. Moreover, the First Amendment could support claims that restrictions on particular nonpolitical expression would have chilling effects on political speech. Such contentions would figure prominently in the adjudication of many free speech cases, but my discussion presumes scenarios in which they would not be available in order to focus on how the Due Process Clause would work distinctly to protect speech.

The discussion briefly examines my proposal's potential effects on three important categories of speech that frequently lack political salience: artistic and cultural expression, pornography, and commercial advertising.

#### A. ARTISTIC AND CULTURAL EXPRESSION

The imperative to protect nonpolitical artistic and cultural expression against censorship has traditionally formed the most intuitive basis for criticizing proposals to extend First Amendment protection only to political speech.<sup>248</sup> Advocates of the private rights theory have made a powerful case for constitutional protection of artistic speech based on its deeply personal importance to the artist.<sup>249</sup> Although public rights theorists have finessed the issue by reference to art's often indirect political messages, maintaining the singular constitutional status of political speech requires treating a significant portion of artistic expression as nonpolitical.<sup>250</sup> Under present First Amendment doctrine, courts emphasize the value of artistic and cultural expression for personal autonomy and, in terms

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tective scope. See Hunter, *supra* note 170, at 1119 (arguing that the Court's conservative wing "has fought to enshrine the category of fundamental rights as a containment device").

248. See *supra* notes 130–40 and accompanying text (describing the consensus in favor of constitutional protection for nonpolitical speech).

249. A very effective recent example is Anne S. Kurzweg, *Live Art and the Audience: Toward a Speaker-Focused Freedom of Expression*, 34 HARV. C.R.-C.L. L. REV. 437, 439–40 (1999).

250. See *supra* notes 143–45 and accompanying text.



redolent of *Lawrence*, extend constitutional protection on that basis. In the words of one recent opinion: “The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree . . . .”<sup>251</sup>

Courts, however, have failed to develop a fully coherent justification for protecting artistic and cultural expression under the First Amendment,<sup>252</sup> a deficit that has sometimes led to unsatisfactory constitutional protection for important speech. Artistic and cultural expression is especially vulnerable when it explores themes of sexuality, thereby blurring some officials’ and courts’ perception of the boundary between art and pornography.<sup>253</sup> Some decisions have blithely tolerated morally based regulation of art, particularly in the familiar circumstance where government patronage underwrites censorship. In *National Endowment for the Arts v. Finley*, the Supreme Court upheld a statutory requirement that federal decisions to fund art “tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public.”<sup>254</sup> Although the Court tried to downplay the “decency and respect” requirement as merely advisory,<sup>255</sup> it substantively defended the requirement as an appropriate element of the discretion necessarily exercised in a competitive funding process.<sup>256</sup> Similarly, in *Hopper v. City of Pasco*,<sup>257</sup> the Ninth Circuit recognized the prerogative of municipalities to exclude “controversial” art from public forums. In sustaining a First Amendment challenge by artists whose work the city had refused to

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251. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 818 (2000); see also *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 248 (2002) (“Art and literature express the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach.”).

252. See Kurzweg, *supra* note 249, at 438 (noting the absence of coherent theory and criticizing the Supreme Court’s medium-specific approach to First Amendment protection of art).

253. For a discussion of pornography regulation, see *infra* Part III.B.

254. 524 U.S. 569, 576 (1998) (alteration in original) (quoting 20 U.S.C. § 954(d)(1) (2000)).

255. *Id.* at 581.

256. *Id.* at 585–86 (justifying the “decency” requirement as an appropriate component of discretionary allocation of limited funds).

257. 241 F.3d 1067 (9th Cir. 2001).

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display, the court concluded only that the city had failed to define and enforce its prohibition on “controversial” art, not that such a prohibition violated the Constitution.<sup>258</sup>

More prevalent than manifest judicial allowance for moral censorship of artistic and cultural expression has been preemptive or reactive self-censorship by sponsoring institutions. The Smithsonian Institution endured a barrage of such actions during the 1990s. First, objections by western senators to the explanatory texts of an exhibit, *The West as America*, which forthrightly dealt with such issues as the ideological nature of the United States’ western expansion and white settlers’ massacre of Native Americans, led the National Museum of American Art to sanitize the offending texts.<sup>259</sup> Just weeks later, the Smithsonian’s director temporarily removed a work by artist Sol LeWitt from a tribute to photographic pioneer Eadweard Muybridge because she deemed the work, a box with apertures through which viewers observed an approaching nude female, “degrading to women.”<sup>260</sup> In 1996 the National Air and Space Museum cancelled a long-planned exhibit commemorating the *Enola Gay*’s atomic bombings of Japan because of controversy about the exhibit’s questioning the justifications for the bombings.<sup>261</sup> Nongovernmental beneficiaries of government cultural subsidies face similar pressures. In recent years, fear of controversy within the National Endowment for the Arts “has resulted in a kind of self-censorship among arts groups, officials of several organizations say, in which applicants try to second-guess what the endowment will approve.”<sup>262</sup>

Although public patronage looms large in any discussion of artistic and cultural censorship, governments also use their police powers to suppress provocative or offensive art. Cities shut down exhibitions due to complaints about offensive content.<sup>263</sup>

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258. See *id.* at 1078.

259. See Michael Kimmelman, *Old West, New Twist at the Smithsonian*, N.Y. TIMES, May 26, 1991, § 2, at 1.

260. See Michael Kimmelman, *Peering into Peepholes and Finding Politics*, N.Y. TIMES, July 21, 1991, § 2, at 1.

261. See Paul Goldberger, *Historical Shows on Trial: Who Judges?*, N.Y. TIMES, Feb. 11, 1996, § 2, at 1.

262. Robin Pogrebin, *A New Chief Steps in at a Changed National Endowment for the Arts*, N.Y. TIMES, Dec. 22, 2001, at A19.

263. See, e.g., Joe Lewis, *Watts Towers Show Nixed*, ART AM., Dec. 2001, at 25 (describing Los Angeles officials’ decision to shut down an exhibit that included images of “same-sex dancing partners” and “renderings of police officers and local gang members in what many deemed to be homoerotic poses”).

The FCC fines performers for expressing controversial or arguably immoral viewpoints over broadcast media.<sup>264</sup> States prosecute artists or museums for fine-art photography that incorporates images of unclothed children.<sup>265</sup> Even worse, fear of government action, as in the context of subsidies, often leads artistic and cultural institutions to engage in self-censorship.<sup>266</sup> In the wake of the September 11 terrorist attacks, numerous institutions suppressed expression that might have appeared offensive or provocative in light of the attacks.<sup>267</sup> As in the controversies about government funding, sexual content has provided the most consistent source of concern. In one recent example, the Denver Civic Theatre pulled down a painting displayed in conjunction with a performance because the painting depicted two men kissing.<sup>268</sup> On a broader scale, the film, television, music, video game, and comic book industries, under heavy pressure from the federal government, have all imposed highly visible rating systems on creators.<sup>269</sup> All these episodes provide cause to fear that our legal system cannot or will not protect challenging, autonomous artistic or cultural expression from majoritarian censorship.

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264. See, e.g., *Jones v. FCC*, 02 CIV. 693 (DLC), 2002 U.S. Dist. LEXIS 16396, at \*8–9 (S.D.N.Y. Sept. 4, 2002) (denying on jurisdictional grounds a poet's complaint against the FCC for branding one of her works "indecent").

265. See, e.g., Chuck Philips, *A War on Many Fronts*, L.A. TIMES, Dec. 26, 1990, at F1 (discussing the federal investigation of photographer Jock Sturges and the indictment of the Cincinnati Contemporary Arts Center and its director).

266. Investigations and harassment by government agencies certainly help explain private art institutions' resort to self-censorship as an alternative to adverse government action. See Axtman, *supra* note 52 (describing an aggressive federal investigation of a politically charged art exhibit).

267. See Magarian, *Wartime Debate*, *supra* note 28, at 123–24 (describing instances of self-censorship by privately owned artistic and cultural institutions following the 2001 terrorist attacks). Much of the art that raised concerns after September 11 has undeniable political content, which means it would receive First Amendment protection under this Article's approach to expressive freedom.

268. See Penny Parker, *Kiss-Off of Gallery's Artwork a Low for 'Puppetry' Promoters*, ROCKY MTN. NEWS, Oct. 8, 2003, at 7A.

269. See, e.g., *Rating Entertainment Ratings: How Well are They Working for Parents and What Can be Done to Improve Them?: Hearing Before the S. Comm. on Governmental Affairs*, 107th Cong. 136–57 (2002) (statement of Joanne Cantor, Professor, University of Wisconsin-Madison), available at [http://www.joannecantor.com/senatrat\\_tst.htm](http://www.joannecantor.com/senatrat_tst.htm) (describing present voluntary entertainment ratings and advocating government action to strengthen and standardize ratings).

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Unless we accept the unsavory premise that public patronage carries with it some special government prerogative to impose orthodoxy of viewpoint,<sup>270</sup> considerations of “decency” and “controversy” should be out of bounds when the government decides whether and how to sponsor artistic and cultural expression.<sup>271</sup> Principles of expressive freedom even more obviously should preclude government censorship of private artistic and cultural speech. In both contexts, the Constitution should provide assurances sufficient to deter preemptive self-censorship. The holes in present First Amendment doctrine’s protection of nonpolitical artistic and cultural expression derive from courts’ failures to recognize the full constitutional significance of personal autonomy and to reject morally based assaults on autonomous expression. The autonomy and harm principles articulated in *Lawrence* make substantive due process a more cogent and effective source of constitutional protection for nonpolitical artistic expression than the First Amendment has been. Under the reasoning of *Lawrence*, art’s importance for furthering personal autonomy would elevate censorship of art to the

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270. See *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 599 (1998) (Scalia, J., concurring in the judgment) (“I regard the distinction between ‘abridging’ speech and funding it as a fundamental divide, on this side of which the First Amendment is inapplicable.”). Among many reasons to reject this doctrine, a few can be summarized briefly: the government should never develop a habit of drawing moral distinctions among citizens’ competing ideas; government funding has sufficient importance to make it a practical necessity for many artists; and discretionary government rejection of a particular moral perspective strongly implies government disapproval of that perspective, raising the danger of a chilling effect on other speech. The public rights theory may also compel a strong rule of government nondiscrimination in subsidizing expression as a protective condition on the theory’s heightened tolerance for government regulation to expand expressive freedom. See Sunstein, *supra* note 15, at 297–99 (advocating such a rule).

271. A conceivable objection to my contention that the Due Process Clause would toughen the Court’s protection of art in the particular context of government sponsorship is that the Court, in *DeShaney v. Winnebago County Department of Social Services*, held that the Due Process Clause does not place affirmative obligations on the government. 489 U.S. 189, 195–97 (1989). That objection lacks force. When the government establishes a public grant program and then chooses one applicant over another on moral grounds, it is exercising its discretion within a course of action to which it has already committed. That commitment distinguishes the arts-funding scenario from the *DeShaney* majority’s account of the case before it, where the state agency had taken no actions that would have led it to remove a reportedly abused child from his father’s custody. See *id.* at 192–93 (describing the state’s actions in the case). Moreover, the Court decided *DeShaney* during a period when it generally disdained substantive due process doctrine, and *Lawrence* represents a clear break from that period.

height of substantive due process concern.<sup>272</sup> Likewise, the *Lawrence* Court's firm rejection of moral grounds for restricting personal autonomy should place nearly all artistic and cultural censorship out of bounds.<sup>273</sup> Justifying a restriction on artistic or cultural expression would require a persuasive showing that the expression caused concrete harm.<sup>274</sup> Ideological biases and "decency" canards would not suffice.

## B. PORNOGRAPHY

The Supreme Court purports to accord full First Amendment protection to nonobscene sexually explicit speech.<sup>275</sup> The Court, however, has shown unusual willingness to credit the government's grounds for regulating pornography. For example, in *Barnes v. Glen Theatre, Inc.*, which upheld certain state restrictions on nude dancing, the Court only grudgingly admitted that such performance was expressive conduct at all<sup>276</sup> and then subordinated the respondents' expressive interests to an amorphous "substantial government interest in protecting order and morality."<sup>277</sup> Similarly, the Court has upheld municipal zoning ordinances that restrict the locations of adult entertainment businesses, minimizing the expressive interests at issue while validating government prerogatives to combat posited but undocumented "secondary effects" of such businesses.<sup>278</sup> The Court has even placed a subset of sexually ex-

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272. See *supra* Part II.A.1 (discussing the *Lawrence* decision's commitment to personal autonomy as the basis for substantive due process doctrine).

273. See *supra* Part II.A.2 (discussing the *Lawrence* decision's rejection of purely moral grounds for government regulation of activity with value for personal autonomy).

274. One submission that might satisfy this standard would be a demonstrated public health risk from an artistic performance that exposed an audience to contaminated blood. See Kurzweg, *supra* note 249, at 483.

275. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 874–75 (1997) (reiterating the doctrine that, for adults, nonobscene sexually explicit speech receives constitutional protection).

276. See 501 U.S. 560, 566 (1991) (holding that exotic dancing "is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so").

277. *Id.* at 569.

278. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (upholding a Renton, Washington, ordinance that mandated distances between adult movie theatres and residential neighborhoods, churches, parks, and schools); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 63, 73 (1976) (upholding Detroit ordinances that prohibited concentrations of adult-oriented businesses).

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plicit speech, labeled “obscenity,” entirely outside the First Amendment’s protection.<sup>279</sup> These departures from First Amendment doctrine resist principled explanation and threaten to undermine the precepts of expressive freedom.

Moving nonpolitical speech protection from the First Amendment to the Due Process Clause would sharpen constitutional analysis of pornography regulation. First, pornographic material’s entitlement to constitutional protection, rather than turning on the material’s technically expressive character, would depend largely on the material’s contribution to the personal autonomy of its creators and/or consumers. Pornography producers could not simply run to court, crying about lost profits. On the other hand, courts could not reflexively dismiss pornographic material’s claims to constitutional protection based on abstractions about whether the material was “speech”; instead, they would need to examine the material’s value for advancing personal autonomy. Second, courts would need to distinguish precisely between moral and harm-based justifications for restrictions on pornography, allowing only the latter to vindicate challenged regulations. Regulators would have the opportunity to prove that pornographic material had caused concrete social harms. They could not, however, justify state pornography regulations simply by asserting the existence of unspecified harms, let alone by claiming an interest in upholding some notion of public morality.

A shift from First Amendment to substantive due process protection for pornography probably would produce mixed decisional results. On one hand, constitutional protection for sexually explicit speech would increase dramatically because, in light of *Lawrence*, the Supreme Court’s obscenity doctrine is untenable. The Court’s decision in *Miller v. California* permitted criminal penalties for “obscene” speech, defined to encompass

works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.<sup>280</sup>

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279. See *Miller v. California*, 413 U.S. 15, 24 (1973).

280. *Id.* (footnote omitted).

First Amendment doctrine never should have tolerated such a blatant capitulation to majoritarian biases, but it has. The *Miller* Court's categorical exemption from expressive freedom, however, runs afoul of both aspects of *Lawrence* that would animate substantive due process protection for nonpolitical speech. First, the *Miller* test takes no account of the autonomy value of obscene material. The *Miller* safe harbor for "serious artistic value" provides some basis for considering autonomy arguments, but it speaks in very general terms, leaving the autonomy interests of creators and receivers of "obscene" material invisible. *Lawrence* compels correction of that defect in *Miller*, not least because *Lawrence* itself found autonomy value in what some consider "deviant" sexual behavior<sup>281</sup>—exactly the sort of behavior whose mere portrayal *Miller* allows states to criminalize. Second, *Miller* carved out an exception to First Amendment protection based entirely on states' putative interests in moral regulation, defining the "prurient interest" prong of the obscenity test by reference to the perspective of "the average person, applying contemporary community standards."<sup>282</sup> The Court made no effort to ground the exception in concrete harm to third parties. Under substantive due process as elaborated in *Lawrence*, the species of purely moral regulation enabled by *Miller* cannot survive.<sup>283</sup>

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281. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (explaining that "statutes that purport to do no more than prohibit a particular sexual act . . . touch[] upon the most private human conduct, sexual behavior").

282. *Miller*, 413 U.S. at 24. This factor distinguishes the Court's treatment of "obscenity" from its analysis of other categories of speech as to which it has denied or limited First Amendment protection, all of which threaten some degree of harm to third parties. See *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (incitement to imminent lawless action); *Watts v. United States*, 394 U.S. 705, 707 (1969) ("true threats"); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 268 (1964) (some defamation); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) ("fighting words").

283. One federal judge recently held an obscenity prosecution unconstitutional on the theory that *Stanley v. Georgia*, 394 U.S. 557 (1969), established a fundamental right to possess obscene material, which *Lawrence* must shield from morally based regulation. See *United States v. Extreme Assocs., Inc.*, 352 F. Supp. 2d 578, 586–87 (W.D. Pa. 2005). Another district judge has rejected that argument. See *United States v. Gartman*, Criminal No. 3:04-CR-170-H, 2005 U.S. Dist. LEXIS 1501, at \*5–6 (N.D. Tex. Feb. 2, 2005) (denying a motion for reconsideration). Present First Amendment doctrine cannot coherently support the reasoning of *Extreme Associates*, because that doctrine has long and consistently accommodated the morally grounded *Miller* test despite *Stanley* and despite the otherwise prominent prohibition on viewpoint-based discrimination. Sharpening free speech jurisprudence by applying substantive due process categorically to nonpolitical speech, as this Article proposes, would

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On the other hand, a substantive due process analysis would decrease constitutional protection for pornography that had limited value for the autonomy of artists or consumers, to the extent regulators could show that the material likely would harm third parties. These were precisely the contentions advanced on behalf of the MacKinnon-Dworkin antipornography ordinance struck down in *American Booksellers Ass'n v. Hudnut*.<sup>284</sup> Because institutional profits do not advance personal autonomy in the sense of *Lawrence*, the only viable autonomy claims for pornography would lie with creators—a group that could include writers, photographers, and directors as well as models and performers—and consumers. In many cases, creators might face difficulty trying to parlay the creative content of commercial pornography into viable autonomy claims; moreover, the pornography industry's exploitation of models and performers would likely yield, from their standpoint, negative autonomy values in many cases.<sup>285</sup> Pornography consumers potentially could raise salient claims that various pornographic materials made significant contributions to their sexual autonomy. On the other hand, defenders of the MacKinnon-Dworkin ordinance in *Hudnut* maintained that pornography, far from advancing its consumers' autonomy, undermined some consumers' will, increasing their propensities toward misogyny and sexual violence.<sup>286</sup> Thus, the posited behavioral consequences of pornography provided the most powerful justification for the ordinance, which its defenders characterized as protecting women from rape and other forms of gendered violence and exploitation that shatter their autonomy.

In his *Hudnut* opinion, Judge Easterbrook offered no suggestion that any person's autonomy was relevant to evaluating the ordinance; instead, he stressed the importance of preventing government from interfering with the descriptive category of "speech."<sup>287</sup> Likewise, Judge Easterbrook turned the harm

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repair this long-standing anomaly more effectively than either trying to patch flawed First Amendment doctrine piecemeal with bits of *Lawrence* or imagining that *Lawrence* completely subsumed the First Amendment within the Due Process Clause.

284. 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (mem.).

285. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 127–33 (1987) (arguing that the pornography industry materially exploits and demeans women who work in it).

286. See *Hudnut*, 771 F.2d at 329 (accepting the government's premise that "[d]epictions of subordination tend to perpetuate subordination").

287. See *id.* at 327–28.



arguments advanced by the ordinance's defenders against them, concluding that any rape or harassment that resulted from pornography demonstrated pornography's rhetorical effectiveness.<sup>288</sup> These elements of Judge Easterbrook's decision, while controversial even on conventional First Amendment terms, reflect the reality that the ordinance faced a strong First Amendment challenge simply because it restricted speech. A substantive due process analysis would proceed from more precise premises: the centrality of autonomy for nonpolitical speech protection and the requirement of harm to justify regulation. Had the ordinance's defenders succeeded in undermining autonomy arguments made on behalf of pornography and in linking pornography to concrete harms, they might well have defeated a due process challenge.<sup>289</sup>

### C. CORPORATE AND COMMERCIAL SPEECH

The Supreme Court over the past three decades has developed an increasingly expansive doctrine of First Amendment protection for corporate speech. The Court generally treats corporations like individuals in First Amendment analysis, extending full protection to most types of corporate speech.<sup>290</sup> The Court has distinguished from fully protected expression the

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288. See *id.* at 329 (asserting that any harm caused by pornography "simply demonstrates the power of pornography as speech").

289. I offer no view about the likelihood of making either showing, and my hesitation about predicting the result in the due process scenario reflects a doctrinal problem that adopting my proposal would require the Court to resolve. Whatever its other constitutional defects, the version of the MacKinnon-Dworkin ordinance struck down in *Hudnut* was drafted in a manner that almost certainly rendered it overbroad, though the district court declined to reach the issue. See *Am. Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316, 1339–40 (S.D. Ind. 1984). The First Amendment overbreadth doctrine represents a singular exception to standing doctrine developed in the context of the present, inclusive First Amendment to protect against government action that chills expression. See *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (describing First Amendment overbreadth doctrine as an exception to ordinary standing rules). The First Amendment overbreadth doctrine should apply in substantive due process cases where challenged burdens on nonpolitical speech threaten to cross into the First Amendment's domain by chilling political expression.

290. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 795 (1978) (striking down a state restriction on corporate expenditures to influence referendum proposals); see also *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983) (distinguishing the lesser First Amendment protection accorded commercial advertising from the full protection accorded the corporation's "direct comments on public issues").

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category of “commercial speech,” a term of art that generally encompasses commercial advertising.<sup>291</sup> Even that subset of corporate speech, however, gets substantial First Amendment protection under a species of intermediate heightened scrutiny.<sup>292</sup> Although the Court’s protection for “commercial speech” deviates from its prior deference to government regulation of advertising,<sup>293</sup> several Justices have advocated further diminishing the distinction between commercial speech and fully protected speech.<sup>294</sup> In contrast to my proposal’s beneficial implications for artistic and cultural expression<sup>295</sup> and ambiguous implications for pornography,<sup>296</sup> shifting protection for nonpolitical speech from the First Amendment to the Due Process Clause would substantially diminish constitutional protection for commercial speech and for corporate speech generally.

The Supreme Court generally grants substantive due process protection only to natural persons. That limitation marks one of the strongest distinctions between the contemporary substantive due process doctrine that emerged from *Griswold v. Connecticut*<sup>297</sup> and the discredited doctrine of *Lochner v. New York*.<sup>298</sup> The *Lawrence* Court’s crystallization of personal

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291. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (defining the special First Amendment category of “commercial speech” as connoting “speech that does no more than propose a commercial transaction”) (internal quotation marks and citation omitted).

292. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980) (“If [commercial speech] is neither misleading nor related to unlawful activity . . . [t]he State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State’s goal.”).

293. See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (holding that constitutional speech protection did not extend to commercial advertising).

294. See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) (plurality opinion) (advocating more searching First Amendment review of commercial speech regulations that serve “end[s] unrelated to consumer protection”); *id.* at 523 (Thomas, J., concurring in part and concurring in the judgment) (rejecting the *Central Hudson* balancing test for commercial speech “at least when, as here, the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark”) (footnote omitted).

295. See *supra* Part III.A.

296. See *supra* Part III.B.

297. 381 U.S. 479, 485–86 (1965) (striking down a state ban on dispensing contraceptives as a violation of the fundamental constitutional right to privacy).

298. 198 U.S. 45, 64 (1905) (striking down a state regulation of employees’ hours as a violation of the substantive due process right to contract).

autonomy as the basis for substantive due process protection strengthens the logic of limiting due process protection to individuals, because only individuals can experience personal autonomy. The limitation of substantive due process protection to natural persons also distinguishes due process doctrine from the Supreme Court's protection of commercial speech under the First Amendment. That protection reflects the Court's general tendency to extend constitutional rights guarantees to corporate "persons" without regard to any underlying interest of discrete individuals.<sup>299</sup> Thus, one important consequence of shifting protection for nonpolitical speech from the First Amendment to the Due Process Clause would be that only natural persons' interests could form the basis for nonpolitical free speech claims. Those interests might be manifest in certain institutions, such as theater companies or publications' editorial boards, but a claim could prevail only if suppression of the speech at issue undermined some natural person's or persons' personal autonomy.<sup>300</sup> This limitation would render corporate free speech claims presumptively untenable.

The logic of allowing only natural persons to raise nonpolitical speech claims under the Due Process Clause, and the resulting dearth of constitutional protection for corporate speech, underscores the *Lawrence* doctrine's affinity with previous autonomy-based theories of expressive freedom. Professor Baker, perhaps the most sophisticated proponent of an autonomy-based approach to the First Amendment, has argued that an autonomy focus should preclude protection for corporate speech.<sup>301</sup> Baker conceptualizes expressive freedom as a shield for "individual freedom and choice," and he rejects constitutional protection for commercial speech, broadly defined to encompass corporate speech generally, because "commercial speech does not represent an attempt to create or affect the

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299. See *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394, 394–95 (1886) (extending the equal protection doctrine to corporations).

300. For a related contention that only natural persons' autonomy interests should ground constitutional rights claims and insulate behavior from constitutional responsibility through the public-private distinction, see Magarian, *Wartime Debate*, *supra* note 28, at 146–50.

301. See generally C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976) (arguing that First Amendment theory requires that commercial speech be denied First Amendment protection). But see Redish, *supra* note 104, at 630–35 (arguing that commercial speech, because of its important contributions to "self-realization," should enjoy First Amendment protection).

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world in a way which can be expected to represent anyone's private or personal wishes."<sup>302</sup> The present doctrine of forceful First Amendment protection for commercial speech has developed in spite of the Supreme Court's substantial embrace of the autonomy-based private rights theory.<sup>303</sup> Eliminating that anomaly would exemplify the increased clarity a substantive due process approach would bring to nonpolitical speech controversies.

In contrast to Baker's single-minded emphasis on the speaker's autonomy,<sup>304</sup> the conception of personal autonomy this Article has derived from *Lawrence* also encompasses the autonomy interests of people who receive information.<sup>305</sup> Under conventional First Amendment analysis, the Supreme Court has maintained that consumers gain valuable insights, and thus increase their ability to make autonomous decisions in the economic marketplace, through exposure to commercial information.<sup>306</sup> Stripping away the rhetorical bunting of the First Amendment, however, would facilitate a fresh critique of receiver-focused arguments for protecting corporate and commercial speech. First, the due process setting would provide space that the First Amendment precludes for considering countervailing ways in which commercial speech diminishes personal autonomy by manipulating its audience. Just as pornography arguably can erode some of its consumers' inhibitions against rape and sexual assault,<sup>307</sup> commercial advertising arguably can erode its receivers' resistance to unfulfilling or even harmful consumption.<sup>308</sup> Second, even to the extent commercial

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302. Baker, *supra* note 301, at 3. Baker extends his limitation on First Amendment protection to exclude corporate speech generally, including corporate political speech, because profit incentives rather than individual value choices motivate corporate speech. *See id.* at 14–18.

303. *See supra* notes 2–13 and accompanying text.

304. *See* Baker, *supra* note 301, at 8 (arguing that the First Amendment “does not give the listener any right other than to have the government not interfere with a willing speaker’s liberty”).

305. *See supra* notes 245–46 and accompanying text.

306. *See, e.g.,* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (positing “that [commercial] information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them”).

307. *See supra* notes 280–89 and accompanying text.

308. “The economic enterprise does not passively accept individual values as given. In order to increase profits, the enterprise attempts to create and manipulate values. It does this by stimulating particular desires.” Baker, *su-*

speech increases consumers' autonomy, that effect falls short of the autonomy benefits enjoyed by receivers of art and even some pornography. Those forms of nonpolitical expression frequently connect with their audiences at deep levels of personal intimacy. In contrast, the principal argument for protecting commercial speech—that it assists consumers in making economic decisions—speaks to the less integral idea of economic autonomy. Corporations' advertisements surely facilitate consumer purchasing choices, but so do their manufacturing decisions, financial strategies, and distribution practices, all of which the Court's disavowal of *Lochner* long ago made clear the government may regulate without regard to due process concerns.

In addition, the Due Process Clause likely would protect commercial speech less forcefully than the First Amendment does because rationales offered for regulating commercial speech, as opposed to those offered for regulating art and pornography, tend to appeal much more to practicality than to morality.<sup>309</sup> States tend to regulate commercial advertising because of concerns about consumer protection<sup>310</sup> or public health.<sup>311</sup> Present First Amendment doctrine gives courts a basis for dismissing even those interests as insufficient to justify

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*pra* note 301, at 19. The Supreme Court has shown inconsistency in evaluating consumer manipulation arguments against protection of commercial advertising. Compare *Posadas de P.R. Assocs. v. Tourism Co.*, 478 U.S. 328, 340–44 (1986) (upholding a regulation of gambling advertising based on an interest in not encouraging gambling), with *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504, 516 (1996) (striking down a regulation of liquor advertising despite the state's interest in not encouraging alcohol abuse).

309. See *supra* notes 252–58, 280–83 and accompanying text (discussing the moral bases of efforts to regulate art and pornography).

310. See, e.g., *Bates v. State Bar*, 433 U.S. 350, 378 (1977) (noting that the state defended its ban on attorney advertising on the ground that advertising would lead attorneys to provide clients with services not tailored to clients' particular needs).

311. See, e.g., *Va. State Bd. of Pharmacy*, 425 U.S. at 767 (noting that the state defended its drug price advertising ban on the ground that such advertising “will place in jeopardy the pharmacist's expertise and, with it, the customer's health”). Some commercial speech regulations arguably serve purely moral purposes. See, e.g., *Posadas de P.R. Assocs.*, 478 U.S. at 341 (upholding a restriction on casino gambling advertising as advancing a substantial government interest in “reduction of demand for casino gambling by the residents of Puerto Rico”). Assuming a state could not show that such a regulation prevented some cognizable injury within the meaning of the *Lawrence* harm principle, and assuming the regulated advertisement advanced personal autonomy in some meaningful sense, a substantive due process approach to protecting noncommercial speech would foreclose the regulation.

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regulations.<sup>312</sup> In contrast, the Due Process Clause after *Lawrence* compels a pivotal distinction between merely moral reasons for regulating conduct and reasons that rely on a danger of concrete injury to third parties.<sup>313</sup> Particular commercial speech regulations might fail due process review because they rested on insufficiently forceful showings of potential for injury, but courts could not presumptively dismiss the justifications usually offered for regulating commercial speech.

## CONCLUSION

Present First Amendment doctrine does not protect expressive freedom well enough. By treating political expression like any other kind of speech and balancing it against government regulatory interests, federal courts have allowed entrenched power and majoritarian pressure to stifle political debate and dissent. Conversely, by following the intuition that personal autonomy justifies expressive freedom but never explicating what personal autonomy means and what government interests can properly trump it, courts have created an often incoherent system of expressive freedom that underprotects artistic and cultural expression, overprotects corporate and commercial speech, and manages at turns to overprotect and underprotect pornography. Theorists who view expressive freedom as a positive public right rooted in the need for informed democratic discourse have long advocated a sensible solution to the political speech side of the problem: narrow the First Amendment's protection to political speech but deepen the force of that protection to make suppression of political expression virtually impossible.

The Supreme Court's substantive due process jurisprudence complements that solution by providing a way to protect nonpolitical speech outside the First Amendment. The Court has grounded substantive due process protection in a rich and thorough account of personal autonomy. The Court also has declared that personal autonomy interests must yield to countervailing governmental regulatory interests only where the government regulates to prevent some tangible harm, as distinct

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312. See *Bates*, 433 U.S. at 378–79 (rejecting a consumer protection rationale on grounds of predicted ineffectiveness); *Va. State Bd. of Pharmacy*, 425 U.S. at 770 (rejecting a public health justification on grounds of paternalism).

313. See *supra* notes 213–18 and accompanying text (discussing the *Lawrence* Court's embrace of the harm principle).

from a purely moral affront to the majority's sensibilities. These two principles of substantive due process, which resonate deeply with the rhetoric of prevailing autonomy-based First Amendment doctrine, allow for a revision of constitutional expressive freedom that would reflect the distinct reasons why the Constitution protects political and nonpolitical speech. Nonpolitical expression, which contributes powerfully but not uniquely to the personal autonomy of both speakers and listeners, should take its place in the pantheon of substantive due process rights, where the Court's prohibition against purely moral regulation provides strong assurance against government censorship of unpopular ideas.

This Article's proposal for amending free speech doctrine may raise concerns in two camps. First, some civil libertarians may view it as a Trojan horse, designed to impose on the First Amendment a substantive preference for political speech while maneuvering nonpolitical speech into a weakened position. In fact, my proposal refines the public rights theory of expressive freedom by taking personal autonomy seriously and developing a basis for powerful nonpolitical speech protection that improves on the coherence of present First Amendment doctrine. Second, judicial minimalists may fear assigning courts the conceptually difficult and important tasks of distinguishing political from nonpolitical speech and, in nonpolitical speech cases, striking a proper balance between personal autonomy values and government interests in preventing harms. My proposal, however, asks judges to draw no more difficult lines and strike no more challenging balances than any doctrine of expressive freedom inevitably must and present First Amendment doctrine already does. The proposal improves on present doctrine by compelling judges in free speech cases to articulate and apply the specific values that anchor our constitutional commitment to protecting both political and nonpolitical speech.